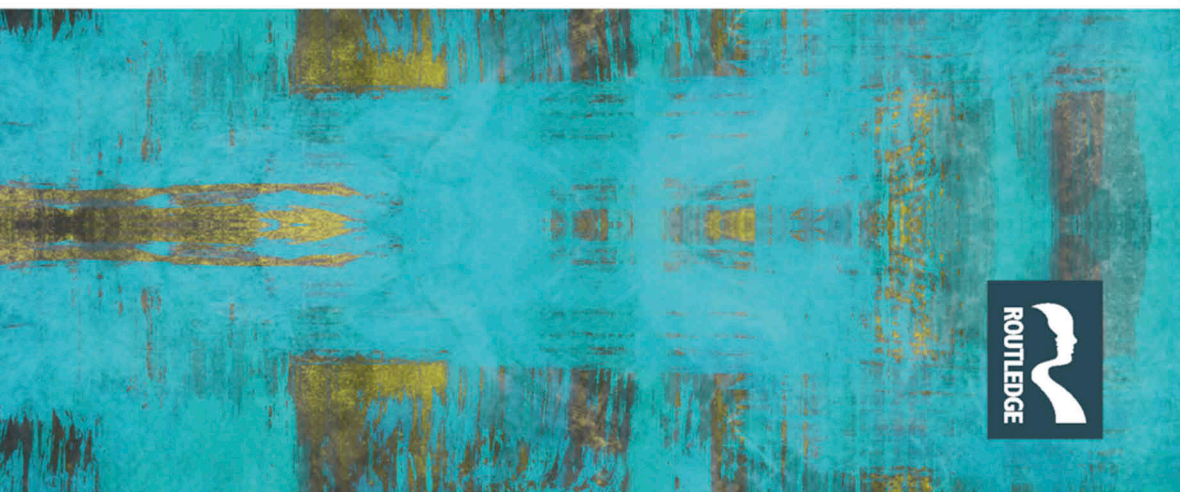
INTERNATIONAL COOPERATION, COMPETITION AUTHORITIES AND TRANSNATIONAL NETWORKS

Mateusz Błachucki



International Cooperation, Competition Authorities and Transnational Networks

This book presents a comprehensive study of the emergence, functioning and evolution of international cooperation among competition authorities. It presents an in-depth look at network cooperation taking place within international organisations, as well as networks based on binding international agreements and various informal networks, among others. It further identifies and analyses the forms of international cooperation among national competition authorities (NCAs) that are taking place within transnational competition networks. The book classifies these forms of cooperation by grouping them into three stages – soft, developed and enhanced cooperation – discussing each in detail. It thus reflects the evolution of the international cooperation process and provides insights as to its possible development. This work will be of interest to researchers, academics and advanced students in the fields of competition law, public administration, international relations and those interested in international competition law and its contribution to global public governance.

Mateusz Błachucki is an Associate Professor at the Department of Administrative Law of the Institute of Law Studies of the Polish Academy of Sciences, where he specialises in competition law, transnational administrative law and administrative procedures. He serves as an adviser to the President of the Office for Competition and Consumer Protection (the Polish NCA) and is an expert in working groups devoted to competition protection and cooperation in various international networks: the International Competition Network, the European Competition Network, European Competition Authorities and the Organisation for Economic Co-operation and Development Competition Committee.

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List of Abbreviations

Scientific journals

AJIL	American Journal of International Law
ARL&SS	Annual Review of Law & Social Science
C&R	Revista de Concorrência e Regulação
CC&EEL	Contemporary Central & East European Law
CMLRev	Common Market Law Review
CPLD	Competition Law & Policy Debate
ECJ	European Competition Journal
ECLR	European Competition Law Review
EJPR	European Journal of Political Research
ELJ	European Law Journal
ELRev	European Law Review
EPL	European Public Law
FILJ	Fordham International Law Journal
GWL	George Washington Law Review
iKAR	internetowy Kwartalnik Antymonopolowy i Regulacyjny
ICLQ	International and Comparative Law Quarterly
IJCL	International Journal of Constitutional Law
IJEP	International Journal of Evidence & Proof
JAE	Journal of Antitrust Enforcement
JCLE	Journal of Competition Law & Economics
JECLP	Journal of European Competition Law & Practice
JEPP	Journal of European Public Policy
JIEL	Journal of International Economic Law
J.L.& Soc.	Journal of Law and Society
JoL	Polish Journal of Law
JPART	Journal of Public Administration Research and Theory
JPP	Journal of Public Policy
JPRG	Jerusalem Papers in Regulation & Governance
LCP	Law and Contemporary Problems
LLR	Liverpool Law Review
MJIL	Michigan Journal of International Law

MJGT	Minnesota Journal of Global Trade
M.P.	Monitor Polski (Poland)
NJILB	Northwestern Journal of International Law and Business
OJ	EU's Office Journal
OSP	Orzecznictwo Sądów Polskich
OZK	Österreichische Zeitschrift für Kartellrecht
PPK	Przegląd Prawa Konstytucyjnego
Pub. Adm.	Public Administration
R&G	Regulation and Governance
REALaw	Review of European Administrative Law
RPEiS	Ruch Prawniczy, Ekonomiczny i Socjologiczny
TILJ	Texas International Law Journal
TJICL	Tulane Journal of International & Comparative Law
UKLR	University of Kansas Law Review
VJIL	Virginia Journal of International Law
YARS	Yearbook of Antitrust and Regulatory Studies
YEL	Yearbook of European Law
YJIL	Yale Journal of International Law
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

Publishers

CUP	Cambridge University Press
IILJ	Institute for International Law and Justice
ILS PAS	Institute of Law Studies Polish Academy of Sciences
IRPA	Institute for Research on Public Administration (Italy)
OUP	Oxford University Press
PUP	Princeton University Press
PWN	Państwowe Wydawnictwo Naukowe
TNOiK	Scientific Society of Organization and Leadership
UMCS	Maria Curie-Skłodowska University in Lublin
UMK	Nicolaus Copernicus University in Toruń
USz	University of Szczecin
UW	Warsaw University
WK	Wolters Kluwer

Other abbreviations

ACF	African Competition Forum
ACM (NL)	Autoriteit Consument & Markt (NL)
ACN	Arab Competition Network
AdCom	Advisory Committee
ADO	authorised disclosure officer
AECLJ	Association of European Competition Law Judges
AEGC	ASEAN Experts Group on Competition

AI	artificial intelligence
APEC	Asia-Pacific Economic Cooperation
ASEAN	Association of South-East Asian Nations
BAT	best available technologies
CAN	Andean Community
CAP	Competition Agency Procedures
CECI	Central European Competition Initiative
COMESA	Common Market for Eastern and Southern Africa
CMA (UK)	Competition & Markets Authority (UK)
CP	contact point
CPLG	Competition Policy and Law Group (APEC)
CPLP	Community of the Portuguese Speaking Countries
EC	European Commission
ECA	European Competition Authorities
ECN	European Competition Network
ECOWAS	Economic Community of West African States
ECtHR	European Court of Human Rights
EFTA	European Free Trade Association
EU	European Union
EUMR	EU Merger Regulation
ICAP	Interstate Council for Antimonopoly Policy
ICN	International Competition Network
ICPAC	International Competition Policy Advisory Committee
IDRC	International Development Research Centre (Canada)
IGE	Intergovernmental Group of Experts on Competition Law and Policy (UNCTAD)
MCF	Marchfeld Competition Forum
MFP	Multilateral Framework on Procedures in Competition Law Investigation and Enforcement
MoU	memorandum of understanding
MWG	Merger Working Group
NATO	North Atlantic Treaty Organization
NB	*nota bene*
NCA	national competition authority
NGA	non-governmental adviser
NGO	non-governmental organization
OCCP	Polish Office of Competition and Consumer Protection
OECD	Organisation for Economic Cooperation and Development
SEECP	Southeast European Cooperation Process
SICA	Central American Integration System
RECAC	Red Centroamericana de Autoridades Nacionales Encargadas del Tema de Competencia
TCN	transnational competition network
TFEU	Treaty on the Functioning of the European Union
UN	United Nations

UNCTAD	UN Conference on Trade and Development
US DOJ	US Department of Justice
WAEMU	West African Economic and Monetary Union
WGTCP	Working Group on the Interaction between Trade and Competition Policy
WTO	World Trade Organization

Table of Legislation

European Union

Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance), OJ L 1, pp. 1–25.

Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (Text with EEA relevance), OJ L 24, pp. 1–22.

Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ L 133.

Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain provisions governing the recovery of damages for infringement of the competition laws of the Member States and of the European Union, as covered by national law, OJ L 349, pp. 1–19.

Directive 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (text with EEA relevance), OJ L 11, pp. 3–33.

Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, OJ L 79I, pp. 1–14.

Poland

Administrative Procedure Code of 14 June 1960, JoL 2017, item 1257.

Act on the Ombudsman of 15 July 1987, JoL 2017, item 958.

Act on the Supreme Audit Authority of 23 December 1994, JoL 2017, item 524.

Constitution of the Republic of Poland of 2 April 1997, JoL 1997, no 78, item 483.

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Telecommunications Law Act, as amended, of 21 July 2000, JoL 2000, no 73, item 852.

List of cases

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Case C-94/00 – *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des frauds* of 22 October 2002, ECLI:EU:C:2002:603.

General Court

Case T-201/11, *Si.mobil v Commission* of 17 December 2014, OJ C 160/24, 28 May 2011.

Case T-355/13, *easyJet Airline v Commission* of 21 January 2015, OJ C 73/25, 2 March 2015.

Case T-419/13, *Union de Almacenistas de Hierros de España v European Commission* of 12 May 2015, ECLI:EU:T:2015:268.

Case T-791/19, *Sped-Pro v Commission* of 9 February 2022, ECLI:EU:T:2022:67.

1 Introduction

1.1 Transnational competition networks and international cooperation of national competition authorities

International cooperation is traditionally reserved for those organs of public administration that – having a political mandate – create, to a greater or lesser extent, the international policy of the state. However, this traditional picture of public administration activity has been changing – as reflected in the emergence and development of transnational administration networks, and the increasing participation of national public administration bodies in these structures. Transnational networks follow the route of domestic governance networks, which is itself a sign of development in network administration governance,[1] but in the transnational sphere. Competition law and cooperation between competition authorities from different jurisdictions seem to be a model example of this trend. The expression 'competition law' and the adjective 'international' have never been as closely linked as they are today.[2]

While the implementation of competition rules remains a national issue, there is a general consensus about the benefits of free and competitive markets. At the same time, differences remain when regulating particular issues, such as the extent of permitted state involvement, export cartels, public cartels, the scope of coverage, and aims. This state of affairs allows for an intensified process of harmonisation of the substance and procedure of national competition rules. Such harmonisation takes a range of forms and affects the various institutions of competition law to varying degrees;[3] but a prerequisite for legal harmonisation is international administrative cooperation, without which it can never be complete or effective. International cooperation of national competition authorities (NCAs) is indispensable, since their jurisdiction is limited; and cooperation is the primary answer to this problem.[4] This

1 Ch.J. Koliba, J.W. Meek, A. Zia, R.W. Mills, *Governance Networks in Public Administration and Public Policy*, Second Edition, London, Routledge, 2019, p. 42–43.
2 A. Ezrachi, 'Setting the Scene. The Scope and Limits of International Competition Law', in A. Ezrachi (ed), *Research Handbook on International Competition Law,* Cheltenham, Edward Elgar Publishing, 2012, p. 3.
3 Ibid.
4 V. Demedts, *The Future of International Competition Law Enforcement. An Assessment of the EU's Cooperation Efforts*, Leiden, Brill, 2019, p. 12.

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cooperation develops best through transnational networks of NCAs. Its tangible effect is the progressive convergence of national laws and their progressive internationalisation. This is also shown by the fact that competition policy has been described as the 'first fully transnational policy' of the European Union[5] and the European Competition Network (ECN) has become a model for other European administrative networks. As it has been succinctly put in the literature, if we assume that administrative *networking* is a manifestation of the new world order, then competition law is the best example of this.[6]

It is even pointed out that international competition law is characterised by a classic form of governance: (transnational) networking.[7] Competition law (national and international) and the cooperation between NCAs owe this to a very large extent to transnational networks – either functioning within international and transnational organisations (eg, the Organisation for Economic Co-operation and Development (OECD),[8] the United Nations Conference on Trade and Development (UNCTAD)[9] and the ECN)[10] or acting independently (eg, the International Competition Network (ICN)[11] and European Competition Authorities (ECA)).[12] The choice of competition networks as examples for studying transnational administrative networks can be found in many academic works,[13] demonstrating that they are considered representative of the phenomenon under study.

5 L. McGowan, S. Wilks, 'The First Supranational Policy in The European Union. Competition Policy', *EJPR*, vol. 28, iss. 2, 1995, p. 141.

6 E.M. Fox, 'Linked-In. Antitrust and the Virtues of a Virtual Network', in P. Lugard (ed), *The International Competition Network at Ten. Origins, Accomplishments and Aspirations*, Cambridge/Antwerp/Portland, Intersentia, 2011, p. 105.

7 I. Maher, A. Papadopoulos, 'Competition Agency Networks Around the World', in A. Ezrachi (ed), *Research Handbook*, p. 60.

8 M. Błachucki, 'The Role of the OECD in Development and Enforcement of Competition Law', *e-Pública – Revista Eletrónica de Direito Público*, vol. 3, iss. 3, 2016, pp. 169 ff.

9 I. Lianos, 'The Contribution of the United Nations to the Emergence of Global Antitrust Law', *TJICL*, vol. 15, iss. 2, 2007, p. 48 ff.

10 O. Danielsen, K. Yesilkagut, 'The Effects of European Regulatory Networks on the Bureaucratic Autonomy of National Regulatory Authorities', *Public Organizational Review*, vol. 14, iss. 3, 2014, pp. 353 ff.; I. Berit, J. Capiau, D. Dalheimer, V. Jukneviciute, P. Krenz, E. Rikkers, A. Sinclair, 'Developments in and around the European Competition Network and Cooperation in Competition Enforcement in the EU. An Update', in V. Marques de Carvalho, C.E. Joppert Ragazzo, P. Burnier da Silva (eds), *International Cooperation and Competition Enforcement. Brazilian and European Experiences from the Enforcers' Perspective*, The Hague, WK, 2014, pp. 33 ff.

11 H.M. Hollman, W.E. Kovacic, 'The International Competition Network. Its Past, Current and Future Role', in P. Lugard (ed), *The International Competition Network at Ten*, p. 67 ff.

12 R. Prates, R. Bayão Horta, 'Cooperation in Multijurisdictional Merger Filings: The ECA Notice Mechanism', in M. Błachucki (ed), *International Cooperation of Competition Authorities in Europe: From Bilateral Agreements to Transgovernmental Networks*, Warsaw, ILS PAS Publishing House, 2021, pp. 170 ff.

13 For example, W. Kerber, J. Wendel, 'Regulatory Networks, Legal Federalism, and Multi-level Regulatory Systems', *MACIE Paper Series*, no 13, 2016, http://www.uni-marburg.de/fb02/makro/forschung/magkspapers/index_html%28magks%29 (accessed 13 June 2016); P.H. Verdier, 'Transnational Regulatory Networks and Their Limits', *YJIL*, vol. 34, iss. 1, 2009, pp. 114 ff.; K. Raustiala, 'The Architecture

Transnational competition networks (TCNs) are not uniform in nature. They can have a formal status, such as the ECN; or they can be a virtual platform for cooperation, such as the ICN. They can take the form of loose cooperation, as in the case of the ECA; or they can create permanent organisational structures, as in the case of the OECD Competition Committee. Transnational networks of administrations use various terms in their names, such as 'network', 'forum', 'initiative', 'committee' or 'group'. However, regardless of the semantic nuances, such networks are always a form of international cooperation among authorities involving mutual influence on the creation of administrative policy by them and – increasingly – on the exercise of administrative jurisdiction by their members. Regardless of the status of particular networks, NCAs engage in their functioning, which translates – with differing intensity – into administrative practice and national legal order.

TCNs are becoming effective and important forms of continental administrative space and even global governance.[14] In a landmark work on the phenomenon of networks, it was pointed out that transnational administrative networks are becoming the structural template for the creation of a new world order.[15] Although these networks have existed in various forms since the 19th century, it is only in recent decades that they have fundamentally changed the shape of international relations and have begun to influence national public administration structures.[16] Quantitative changes in this respect go hand in hand with qualitative changes – in recent years, transnational networks of administrative bodies have developed very intensively and have begun to assume increasingly formalised structures. Moreover, it is acknowledged within global governance theory that transnational networks are an important alternative to the regulatory race towards either centralised or decentralised governance.[17] Transnational networks replace the regulatory race with cooperation that is largely informal, but which leads to the development of common standards and an approximation of how similar issues are handled.[18] Even critics of transnational networks agree that, although their importance is not universal, in certain spheres they play a leading role in the global governance process. An example of this is TCNs, whose constituent bodies have *de facto* or *de jure* guaranteed independence from political factors and implement very similar regulations based on commonly accepted cultural values.[19] Equally important is the fact that the concept of global governance is not so much about

of International Cooperation. Transgovernmental Networks and the Future of International Law', *VJIL*, vol. 43, 2002, pp. 2 ff.

14 A.-M. Slaughter, D. Zaring, 'Networking Goes International. An Update', *ARL&SS*, vol. 2, 2006, p. 219.

15 A.-M. Slaughter, *A New World Order,* Princeton, PUP, 2004, p. 23.

16 Ch. Tietje, 'History of Transnational Administrative Networks', in O. Dilling, M. Herberg, G. Winter (eds), *Transnational Administrative Rule-making. Performance, Legal Effects, and Legitimacy*, Oxford, Hart, 2011, pp. 27 ff.

17 D.C. Esty, D. Geradin, 'Regulatory Co-opetition', *JIEL*, vol. 3, iss. 2, 2000, p. 242.

18 A.-M. Slaughter, D. Zaring, 'Networking Goes International', p. 217.

19 M. Pollack, G. Shaffer, *Transatlantic Governance in the Global Economy*, Lanham, Rowan & Littlefield Publishers, Inc., 2001, pp. 298–299.

creating a global administration as it is about developing procedures and adapting existing institutions to them in order to solve global problems.

The development of TCNs shows that competition law is ceasing to be a purely national domain – an internal product of the national parliament and public administration authorities empowered by it by law to enact executive acts. The development of competition law and its opening to the transnational space are influenced by the following, among other things:

- Continental/regional integration: For example, the *acquis communitaire* received before and after accession to the European Union has significantly changed the competition law of member states.
- International organisations: In many areas of regulation, international organisations and other forums for international cooperation are introducing regulations that affect or even replace national administrative law regulations.
- International interdependence of NCAs: The globalised economy and regional integration have put an end to administrative autarky and have increased the international interdependence of NCAs.

These phenomena have resulted in the creation and encouragement of the adoption (or imposition) of common international competition law standards. These standards then influence national legislatures, and often subsequently become part of national regulations. TCNs are therefore important incubators of change, facilitating the adoption of international competition law standards into national law.

Importantly, TCNs do not limit their activities to standard-setting matters, but also significantly influence the creation of competition policy and even the execution of competition jurisdiction among their members. As a result, as a network develops, it begins to produce its own rules of conduct, which – although often informal – undoubtedly have a real impact on the conduct of the NCAs that are members of the network; and which may also affect the position of addressees of NCAs' actions. At the same time, it is important to be aware that, at the current stage of development, the law governing cooperation between NCAs is not a new form of law, but rather a collective category for acts from various levels of law (eg, national and European administrative law).[20] However, it cannot be denied that even the current output of TCNs gives rise to the claim that this may, in the future, become an important part of global or transnational competition law, constituting a new, separate branch of law.

Focusing primarily on TCNs is also justified because these structures have remained 'network-like' in their essence – unlike, for example, some transnational networks of regulators, where separate agencies or authorities have been created to support or replace, in part, the activities of the network.[21] Moreover, the dynamic

20 E. Schmidt-Assmann, *Ogólne prawo administracyjne jako idea porządku*, Warsaw, C.H. Beck, 2011, p. 494.

21 Examples include European agencies such as the Agency for Cooperation of Energy Regulators and the EU Agency for Railways.

proliferation of competition legislation and the emergence of NCAs have made institutionalised international cooperation between NCAs one of the key spheres of activity within this space.[22] The importance of such cooperation for NCAs in exercising their administrative jurisdiction is what distinguishes them in particular from other national public administration authorities.

This book aims to explain the legal nature of TCNs, to make a legal classification of them and to analyse the forms of cooperation among NCAs that is taking place within such networks. As indicated earlier, TCNs are heterogonous phenomena, which constitutes a fundamental obstacle when trying to conduct such analysis. However, in order to develop studies on the form of international cooperation of NCAs, it is indispensable to formulate a definition. This definition is accompanied by a typology of networks, which results from the fluid nature of TCNs; such a classification may substantially assist in the analysis of networks and the form of cooperation. The initial concentration on networks should not be understood as the sole aim of the book. Networks are not an end in themselves but rather sophisticated hubs for cooperation among NCAs on a transnational level. There is a wide diversity of forms of international cooperation of NCAs, with these forms closely correlated to the nature of the networks. Together with proper characterisation of a particular TCN, one may expect certain typical forms of international cooperation of NCAs. However, together with the dissemination and development of networks, the forms and intensity of cooperation among NCAs are evolving. This book identifies these forms of cooperation by grouping them into three stages: soft, developed and enhanced cooperation.

1.2 The subject of this book

The development of TCNs and the increasingly sophisticated rules of interaction of NCAs within them make this a complex phenomenon. Only some of the emerging TCNs have a clear legal basis and specific legal forms of operation. The growing number of TCNs is resulting in an increase in their activity, which is particularly evident from the number of soft law documents adopted and the ongoing administrative cooperation that often results from them, containing a transnational element. These documents become, in an underregulated and hardly noticeable way, part of the (informal) national rules regulating the functioning of NCAs. At the same time, in contrast to the functioning within the framework of national legal rules, the activities of the networks are largely non-transparent and escape social or formal control. It is often not entirely clear who can supervise the activities of TCNs and how.

This book covers transnational networks of competition authorities. Given the research assumption that the subject covers not only the functioning of TCNs, but also the most typical and widespread types of international cooperation within this

22 A. Italianer, 'A Move Forward on International Cooperation', in V. Marques de Carvalho, C.E. Joppert Ragazzo, P. Burnier da Silva (eds), *International Cooperation*, p. XXIII.

framework, a particularly in-depth analysis concerns those networks that are the most common and that are most important to the international cooperation of NCAs. For this reason, the study covers global networks operating independently (eg, the ICN); those operating within the framework of existing international organisations (eg, the OECD, UNCTAD and the World Trade Organization); and those with a continental scope, including primarily European networks (eg, the ECN and, to a lesser extent, the ECA) and regional networks (eg, the Central European Competition Initiative (CECI), the Marchfeld Competition Forum and the Nordic Cooperation). In addition, other continental and regional networks of NCAs are included to the extent that they bring new issues to the subject of the research. Therefore, the most important TCNs are included in the study. However, as the geographical scope of a network decreases, the difficulty of studying it increases significantly. On top of this, it is difficult to exhaust the pool of networks to study, especially in relation to regional cooperation. In the case of many regional and sub-continental networks, the status of certain forms of international cooperation between NCAs can be difficult to ascertain – especially for an external observer.

The organs of international and intergovernmental organisations that perform the functions of NCAs – such as the European Commission in the European Union,[23] the Competition Commission in the Common Market for Eastern and Southern Africa (COMESA)[24] and the Competition Authority of the East African Community (EAC)[25] – remain outside the field of interest. These entities do not constitute themselves as TCNs but are organs of regional associations of countries and/or their economies. Moreover, they are authorities that independently issue decisions on behalf of their organisations within their exclusive jurisdiction. For this reason, the study does not discuss the functioning of the European Commission in terms of its exercise of competition jurisdiction; instead, the analysis covers the functioning of European networks of NCAs. Illustratively, other transnational networks are discussed, such as the African Competition Forum, the Intergovernmental Council on Antitrust Policy and the Lusophone Competition Network.

The concept of 'international cooperation of competition authorities' refers to any legal and factual relationship of an essentially non-hierarchical and non-supervisory nature into which NCAs enter with their counterparts from other jurisdictions (transnational or foreign) in the exercise of their activities. The intensity of

23 For an overview of the European Commission as a competition law enforcer, please refer to C. Teleki, *Due Process and Fair Trial in EU Competition Law. The Impact of Article 6 of the European Convention on Human Rights*, Leiden, Brill, 2021, pp. 189 ff.

24 For an overview of COMESA, please refer to G.K. Lipimile, 'The COMESA Regional Competition Regulation', in J. Drexl, M. Bakhoum, E.M. Fox, M.S. Gal, D.J. Gerber (eds), *Competition Policy and Regional Integration in Developing Countries*, Cheltenham, Edward Elgar Publishing, 2012, pp. 205 ff.

25 For an overview of the EAC competition law framework, please refer to J. Karanja-Ng'ang'a, 'EAC Competition Law', in E. Ugirashebuja, J.E. Ruhangisa, T. Ottervanger, A. Cuyvers (eds), *East African Community Law: Institutional, Substantive and Comparative EU Aspects*, Leiden, Brill, 2017, pp. 161 ff.

this relationship may vary, as well as the form and the legal basis. There are three crucial elements of this concept:

- Subjective: It concerns competition authorities.
- Territorial: It concerns authorities from distinct jurisdictions (it refers equally to national jurisdictions in the case of national states, as well as transnational jurisdictions in the case of transnational or international organisations, provided that they are equipped with administrative jurisdiction in competition matters).
- Organisational: Parties to the cooperation are independent of each other and are not part of the same organisational structure with a hierarchical character.

1.3 Methods and materials

The book relies on dogmatic and doctrinal research. This method, taking positive law as a basis, interprets it systematically – that is, in the order of logical groupings of legal material; removes possible gaps and contradictions; explains essential meanings of regulations; sets out definitions of legal notions; and, by means of generalisations, leads to the establishment of principles and guidelines that permeate the given legislation.[26] Thus, this method systematises the studied legal rules into a coherent whole and evaluates trends in legislation and jurisprudence, reconstructing the dogmatics of law on their basis. This means that the dogmatic method is characterised by two levels of analysis: descriptive and normative. The descriptive level is aimed at presenting the current state of the law and its interpretation in the literature. The normative level aims to evaluate the law. It may take the form of a critical analysis of the existing regulations up to the postulates for legal changes.[27] Since the subject of the study in this book is primarily regulations, the formal-dogmatic method is the best research instrument in this respect. Similarly, this method yields excellent results when studying the legal forms of authorities' actions, including administrative decisions, soft law acts and administrative agreements. The essence of the dogmatic method is a two-stage process, during which the relevant sources of law are first identified and then analysed and interpreted. The dogmatic method also requires a critical analysis of the literature on the subject, in order to reveal the existing state of research and the issues that still need to be explored.[28]

In analysing the forms of international cooperation of NCAs within TCNs, all available research materials were taken into account, including press releases of NCAs and investigated networks; reports from surveys, conferences, seminars and workshops; and statements and positions of NCAs and investigated networks, as well as their guidelines and decisions. The research covered the legal bases of the

26 E. Jarra, *Ogólna teoria prawa*, Warsaw, Gebethner i Wolff, 1922, p. 17.
27 S. Taekema, 'Relative Autonomy. A Characterisation of the Discipline of Law', in B. van Klink, S. Taekema (eds), *Law and Method. Interdisciplinary Research into Law*, Tübingen, Mohr Siebeck, 2011, pp. 34–35.
28 T. Hutchinson, 'Doctrinal Research. Researching the Jury', in D. Watkins, M. Burton (eds), *Research Methods in Law*, London, Routledge, 2017, p. 18.

networks and the legal and factual forms of their activities. The relevant legal regulations and soft law acts were analysed, as well as other documents resulting from the activities of the networks. The publicly available materials are enriched by the personal experience of the author, who has been actively engaged in the work of various TCNs for almost two decades.

Due to the interdisciplinary nature of much of the book, it draws on competition law doctrine, public international law legal research and the global and European administrative law *acquis*. Equally useful were the conclusions drawn from the analyses of political and economic sciences concerning the emergence and functioning of TCNs.

1.4 Structure of the book

This book is structured in a logical sequence, allowing the reader to follow the order proposed by the author. However, the chapters may also be read independently, as they are intended to comprehensively capture separate topics. The plan is divided into four main parts. The first part (Chapter 2) serves to explain the theoretical notion of a TCN. Additionally, these considerations have been enriched by a presentation of the treatment of transnational networks in light of political and economic findings.

The second part (Chapters 3–5) analyses the various types of networks selected as the subject of research. The selection was made in accordance with the geographical reach of networks: global, continental and regional. The most appropriate and illustrative examples of each type of network are analysed in Part II. Each of the networks is characterised individually from the point of view of the motives and legal basis for the creation of the network; organisation and membership; object of activity; and forms of activity.

The third part of the book (Chapters 6–8) offers a thorough analysis of forms of cooperation among NCAs within TCNs. First, a classification of forms of international cooperation of NCAs is drawn up, which is divided into three categories in accordance with the intensity of cooperation: soft, developed and enhanced. The division and classification are not purely orderly in nature, but serve to show the stages of progressive cooperation and deepening involvement of NCAs in network activities, and the increasing influence of network cooperation on the exercise of jurisdiction by NCAs. This means that the 'soft' cooperation of NCAs operating within the networks – including the exchange of experience during conferences, meetings and seminars, and the exchange of public information and administrative practice – is analysed first. Next, the analysis covers cooperation related to the establishment of common legislative objectives for network members, standards of operation and the coordination of procedural practice through the adoption of soft law documents – that is, recommendations, best practices, guidelines and other agreed principles of operation. The focus then turns to the cooperation developed through the exercise of jurisdiction by members of TCNs, which concerns information on the opening of proceedings; the exchange of non-confidential information on proceedings; the exchange of information and evidence with the consent of the parties; and procedural

steps in another state, or informal or formal legal assistance. The last issue discussed in this part is the analysis of enhanced cooperation related to the exercise of jurisdiction by participants in TCNs, which may include the joint conduct of administrative proceedings, the coordination of administrative decisions or the mutual recognition of administrative acts. A thorough analysis of the forms of cooperation between NCAs within TCNs makes it possible to identify further areas of cooperation that other institutions may engage in.

The fourth part of the book (Chapters 9–11) is devoted to exploring the conclusions from the previous three parts. Additionally, the supervision of the international activities of NCAs within TCNs, the perspectives of the development of TCNs and the possible consequences of this development for NCAs are shown.

1.5 Terminological notes

The basic terminological issue to be addressed is the conceptual scope of the terms 'intergovernmental'/'transgovernmental'/'transnational'. International legal literature suggests that the term 'intergovernmental' is reserved for diplomatic relations between homogeneous sovereign states represented by heads of government or foreign ministers, which take the form of treaties and often arise within international organisations. 'Transgovernmental' refers to relations between sub-state entities belonging to different national governments based on informal and non-binding agreements and forms of cooperation.[29] 'Transnational' relations, on the other hand, include forms of cooperation between non-governmental actors (organisations, businesses and even individuals) from different countries that take place independently of the governments of those countries.[30] In accepting these findings, the terms 'transgovernmental' and 'transnational' should not be equated. In light of this distinction, 'transnational relations' refers to relations between non-governmental entities from different countries; whereas 'transgovernmental relations' are relations between public administrative authorities that are not part of the government (understood in a strictly political sense or according to the common law doctrine), and that take place across national borders.[31] However, it is difficult to recognise that there is full doctrinal consensus in this respect, so the terms may be used interchangeably.[32] Although the presented distinction is clear on the grounds of some doctrines of public international law, it seems that in the

29 R. Keohane, J.S. Nye, 'Transgovernmental Relations and International Organizations', *World Politics*, vol. 27 iss. 1, 1974, pp. 329 ff.

30 M. Eilstrup-Sangiovani, 'Varieties of Cooperation. Government Networks in International Security', *EUI RSCAS Working Paper*, no 24, 2007, p. 3; D. Bach, 'Varieties of Cooperation. The Domestic Institutional Roots of Global Governance', *Review of International Studies*, vol. 36, iss. 3, 2010, pp. 564 ff.

31 M. Savino, 'The Role of Transnational Committees in the European and Global Orders', *Global Jurist Advances*, vol. 6, iss. 3, 2006, p. 4.

32 K. Yesilkagut, O.A. Danielsen, '*National Competition Regulators Between Regulatory Autonomy and Political Control. The Case of Networked Competition Governance in the European Union*', paper prepared for EGPA Conference, Toulouse 2010, Study-group Temporalities, Public Administration and Public Policy, p. 2, https://soc.

competition law nomenclature, it may raise some doubts. In particular, the extremely unintuitive term 'transgovernmental' raises doubts as to its meaning. In addition, the translation of this word as 'non-state'[33] or 'cross-border', as used in some publications,[34] may deepen the confusion of meaning. In this situation, the term 'transnational competition networks' is used to avoid confusion as to which relationships are meant and which structures are being examined. This allows the parallel transnational dimension of the relations to be emphasised, along with their subjective scope.[35] What is more, such formulations are encountered in the relevant literature on the subject.[36]

Summarising the terminological considerations thus far, each element building the concept of 'transnational networks of competition authorities' has its own meaning. The element 'transnational' contains two features. The first is that the members of the network come from different countries. The second is that transnationality is understood as a kind of 'transgovernmentalism', meaning that cooperation involves specialised administrations (ie, NCAs) working directly with their counterparts, with little or no supervision by the foreign ministry.[37] The 'network' element means that cooperation is based on a loose and essentially non-hierarchical institutional structure developed through direct, numerous and diverse contacts between the actors involved and constituting it, rather than on formal inter-state negotiations. The last component of the concept concerns 'competition authorities'. Even though the courts may perform a jurisdictional function in competition matters, especially in common law systems, the term 'competition authority' refers to specialised public administration bodies that are competent in competition matters, which have a wide range of (formal or factual) independence, but which are not, in principle, part of the government in the strict sense of the term; nor are they a form of representation of territorial communities, whether of a self-governing or autonomous nature.

1.6 Bibliographical annotations

There are general comprehensive works that concern network governance and transnational administrative networks, such as the following:

kuleuven.be/io/egpa/org/2010Toul/Papers/Yesilkagit_danielsen_EGPA%202010.pdf (accessed 3 May 2018).

33 J. Supernat, 'Prawo administracyjne w przestrzeni globalnej', in J. Zimmermann (ed), *Przestrzeń w prawie administracyjnym*, Warsaw, WK, 2013, p. 149.

34 B. Fischer, *Transgraniczność prawa administracyjnego na przykładzie przekazania danych osobowych z Polski do państw trzecich*, Warsaw, WK, 2010, p. 15.

35 For more on the definition of TCNs, see Chapter 2.

36 For example, F. Bignami, 'Individual Rights and Transnational Networks', in S. Rose-Ackerman, P.L. Lindseth (eds), *Comparative Administrative Law*, Cheltenham/Northampton, Edward Elgar Publishing, 2010; X. Fernández-i-Marín, J. Jordana, 'The Emergence of Regulatory Regionalism. Transnational Networks and the Diffusion of Regulatory Agencies within Regions', *Contemporary Politics*, vol. 21, iss. 4, 2015, DOI: 10.1080/13569775.2015.1010776; A. Hamann, H.R. Fabri, 'Transnational Networks and Constitutionalism', *IJCL*, vol. 6, iss. 3–4, 2008.

37 K. Raustiala, 'The Architecture of International…', p. 5.

- A.-M. Slaughter, *A New World Order,* Princeton, PUP, 2004.
- M. Zinzani, *Market Integration through 'Network Governance'. The Role of Networks of Regulators*, Cambridge/Antwerp/Portland, Intersentia, 2012.
- M. De Vissser, *Network-Based Governance in EC Law. The Example of EC Competition and EC Communications Law,* Oxford, Hart, 2009.

More specific issues concerning transnational administrative networks are analysed in a number of articles, of which it is worth pointing out in particular the following:

- A.-M. Slaughter, 'Global Government Networks, Global Information Agencies, and Disaggregated Democracy', *MJIL*, vol. 24, iss. 4, 2003.
- S. Picciotto, 'Networks in International Integration: Fragmented States and the Dilemmas of Neo-Liberalism', *NJILB*, vol. 17, iss. 1, 1997.
- D. Zaring, 'International Law by Other Means. The Twilight Existence of International Financial Regulatory Organizations', *TILJ*, vol. 33, iss. 2, 1998.
- P.-H. Verdier, 'Transnational Regulatory Networks and Their Limits', *YJIL*, vol. 34, iss. 1, 2009.
- K. Raustiala, 'The Architecture of International Cooperation. Transgovernmental Networks and the Future of International Law', *VJIL*, vol. 43, 2002.
- E. Mastenbroek, D. Sindbjerg Martinsen, 'Filling the Gap in the European Administrative Space. The Role of Administrative Networks in EU Implementation and Enforcement', *JEPP*, vol. 25, iss. 3, 2018.

To study TCNs, it is recommended to begin with works on international/global/transnational competition law, such as the following:

- A. Ezrachi (ed), *Research Handbook on International Competition Law*, Cheltenham, Edward Elgar Publishing, 2012.
- D.J. Gerber, *Global Competition. Law, Markets, and Globalization*, Oxford, OUP, 2010.
- O. Budzinski, *The Governance of Global Competition. Competence Allocation in International Competition Policy,* Cheltenham, Edward Elgar, 2008.
- A.S. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, CUP, 2010.
- M.H. Dabbah, *International and Comparative Competition Law*, Cambridge, CUP, 2010.
- J. Drexl, M. Bakhoum, E.M. Fox, M.S. Gal, D.J. Gerber (eds), *Competition Policy and Regional Integration in Developing Countries*, Cheltenham, Edward Elgar, 2012.

Specific issues of TCNs are further discussed in the following works:

- B. Zanettin, *Cooperation between Antitrust Agencies at the International Level*, Oxford, Hart, 2002.

- F. Cengiz, *Antitrust Federalism in the EU and the US*, London, Routledge, 2013.
- V. Marques de Carvalho, C.E. Joppert Ragazzo, P. Burnier da Silva (eds), *International Cooperation and Competition Enforcement. Brazilian and European Experiences from the Enforcers' Perspective,* The Hague, WK, 2014.
- V. Demedts, *The Future of International Competition Law Enforcement. An Assessment of the EU's Cooperation Efforts*, Leiden, Brill, 2019.
- P. Burnier da Silveira, W.E. Kovacic (eds), *Global Competition Enforcement. New Players, New Challenges,* The Hague, WK, 2019.
- M. Błachucki (ed), *International Cooperation of Competition Authorities in Europe: From Bilateral Agreements to Transgovernmental Networks*, 2nd edition, Warsaw, ILS PAS Publishing House, 2021.

Last but not least, there are several monographs devoted to the analysis of specific TCNs:

- C.-D. Ehlermann, I. Atanasiu (eds), *European Competition Law Annual 2002. Constructing the EU Network of Competition Authorities*, Oxford, Hart, 2005.
- S. Brammer, *Co-operation between National Competition Agencies in the Enforcement of EC Competition Law*, Oxford, Hart, 2009.
- P. Lugard (ed), *The International Competition Network at Ten. Origins, Accomplishments and Aspirations*, Cambridge/Antwerp/Portland, Intersentia, 2011.
- P. Lugard, D. Anderson, (eds), *The ICN at Twenty. Accomplishments and Aspirations*, Leiden/New York, Intersentia – Concurrences, 2022.
- Ch. Townley, M. Guidi, M. Tavares, *The Law and Politics of Global Competition. Influence and Legitimacy in the International Competition Network*, Oxford, OUP, 2022.
- J. Molestina, *Regional Competition Law Enforcement in Developing Countries*, Heidelberg, Springer, 2019.
- B. Ong (ed), *The Regionalisation of Competition Law and Policy within the ASEAN Economic Community*, Cambridge, CUP, 2019.

TCNs have gained a lot of attention from many authors, and thus the above guidelines should be treated merely as an introductory and subjective selection of basic literature on the subject, useful at the initial exploratory stage of getting acquainted with the studied subject matter. This can then form the basis for independent studies on the issue of TCNs. A full list of the literature used can be found at the end of this book. In addition, individual works are referred to on an ongoing basis when discussing particular issues.

1.7 Repository of source documents

The book covers a wide range of TCNs. Some of them had already ceased to exist and others disappeared while this book was being prepared. One of main obstacles in writing this book has been obtaining access to documents of TCNs. Even large networks are not always the most transparent – not least due to the constant issue

of website redesigns, which often lead to the loss of older documents. To address this issue, and to facilitate future research in the area of international cooperation of NCAs and the functioning of TCNs, an open repository of source documents has been prepared by the Science Information Centre of Institute of Law Studies of the Polish Academy of Sciences. The repository may be accessed at https://e-bp.inp.pan.pl/handle/123456789/242.

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Writing a book is a long process, encapsulating the author's findings and experiences. This book summarises the research that I conducted under the auspices of the Polish Academy of Sciences, combined with experience from my service at the Polish NCA. The procedural aspects of competition law and institutional aspects of transnational administrative law have always been at the core of my academic interests. I have devoted a lot of time and attention to them. I have also been involved in competition enforcement throughout my professional life; and from the very beginning, I have been responsible for international cooperation and have participated in the works of various TCNs. For that reason, this book brings together both my academic and professional perspectives on international cooperation of NCAs and the functioning of TCNs.

I owe a lot to many friends from various NCAs, whom I have had the pleasure of working with and learning from over the years. I have been involved in the work of various TCNs (eg, the ICN, the OECD, the ECN, the ECA, the ICN Merger Working Group, CECI) for almost two decades, which has always been a great source of inspiration and satisfaction on the academic, official and personal levels. Many findings in this book are based on my experiences and insights from these networks. I am especially grateful to those friends with whom I had the privilege of working within the framework of the EU Merger Working Group (MWG). Since its inception (and even in the informal meetings and discussions that led to its establishment), I have learned a lot and enjoyed myself a great deal from working in this network.

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I hope this book will be useful to anyone interested in the subject.

All remaining errors are mine.

2 The concept and kinds of transnational competition networks

The network concept is encountered in many academic fields and can even refer to different things in different branches of law. This chapter analyses the network concept before narrowing it down to construct a definition of a 'transnational competition network' (TCN). We therefore begin with a close examination of the concept of a network as it functions in the natural sciences and humanities. Our definition is additionally constructed in tandem with an analysis of the main aims of TCNs. These general analyses are extended by presenting various network classifications, so as to better illustrate the diversity of the subject under investigation and verify the usefulness of the formulated definition.

2.1 The concept of a network as an organisational structure

The concept of a 'network' has enjoyed a meteoric rise in both the pure and social sciences. Academics make use of everything from biological networks to the Internet to describe all sorts of phenomena.[1] We seem to live in a world of many varied biological, technical, informational and social networks. The term 'network' has become a core concept and tool in many academic disciplines. This has made it something of an academic and social phenomenon.[2] Microbiologists describe cells as information networks; ecologists view the living environment as a system of networks; and engineers are developing artificial intelligence neural networks capable of self-organisation and self-learning. Networks are studied as forms of social organisation (eg, as part of the sociology of science and technology) in the social sciences; and as industrial and economic grids in economics. This has made the 'network' concept a new paradigm to describe the architecture of organisational complexity.[3] The network has definitely become both a useful and a fashionable concept. It is therefore worthwhile examining its characteristics and giving some thought as to how to define it.

1 S.N. Dorogovtsev, J.F.F. Mendes, *Evolution of Networks. From Biological Nets to the Internet and WWW*, Oxford, OUP, 2003.
2 Ibid, p. V.
3 T. Börzel, 'Organising Babylon: On the Different Conceptions of Policy Networks', *Pub. Adm.*, vol. 76, iss. 2, 1998, p. 253.

DOI: 10.4324/9781003376002-2

The simplest formulation of a network is a set of vertices (or nodes) connected by edges (or links).[4] This is the formulation encountered in theoretical physics and graph theory. According to an equally simple sociological definition, a network is a set of relationships among entities. These entities can be people, organisations, nations, quotations, brain cells or even electrical transformers.[5] Neither the individual entities nor the specific relationships between them constitute the network, but only all of them in combination. A structure can therefore be defined as a network only if a recurring pattern of mutual relationships exists between its entities. At the same time, it should be borne in mind that a network is merely a simplified representation of actual relationships: one that reduces them to their basic components – that is, to the entities that comprise them and the associations that bind them.[6] These definitions capture the essence of a network. If need be, they can obviously be enhanced with additional elements so as to adapt them to particular studies or have them describe particular relationships. This would enable the particular object of study to be distinguished from similar forms of organisation. But however much we expand the definition that we use, a network essentially involves connecting entities with specific types of relationships.

Now that the essence of a network has been laid down, the ways in which this concept has evolved to meet the needs of particular disciplines can be examined. Ascertaining the essence of a given network in a particular field does not predetermine the usefulness of the general network concept in describing the phenomena relevant to that field. The dissemination of the network concept, however, seems to be proof positive of its utility and its adaptability to the needs of particular disciplines. Every academic discipline studies the nodes and connections that are relevant to it. These same networks can therefore be described in various ways, depending on the research methodology employed. In economics, it highlights the fact that an economic network is a group of agents involved in repeatedly exchanging goods and services over an extended period, and with no organised authority to resolve any disputes that might arise. The absence of any superior authority is what distinguishes networks from hierarchical (or centralised) relations. By contrast, the market exchange of goods and services is characterised by transience and anonymity, and is governed by price competition.[7] Some economists have been trying to find alternatives to the market price mechanism in network organisations, and to centralised management in situations where knowledge and the ability to act quickly are required and which involve homogeneous groups of mutually trusting constituents.[8] Some economic theories regard

4 S.N. Dorogovtsev, J.F.F. Mendes, *Evolution of Networks*, p. 6.
5 Ch. Kadushin, *Understanding Social Networks. Theories, Concepts, and Findings*, Oxford, OUP, 2012, pp. 3–4.
6 M.E.J. Newman, *Networks: An Introduction*, Oxford, OUP, 2010, p. 10.
7 J.E. Rauch, G.G. Hamilton, 'Networks and Markets: Concepts for Bridging Disciplines', in J.E. Rauch, A. Casella (eds), *Networks and Markets*, New York, Russell Sage Foundation, 2001, p. 1.
8 W. Powell, 'Neither Market nor Hierarchy: Network Forms of Organization', *Research in Organizational Behavior*, vol. 12, 1990, p. 325.

networks as a new management structure for households and commercial organisations.[9]

By contrast, a political network, when analysed from the standpoint of political science, is understood to be the aggregate of the reasonably stable non-hierarchical relationships that result from interdependence, and which associate a large number of heterogeneous participants that share common political interests and set out to achieve them by pooling their resources, on the assumption that their best chance of success lies in working together.[10] To put it another way, should it prove impracticable or unwieldy to coordinate a social environment of increasing vigour and complexity on the basis of hierarchical relationships, and should the state's capacity for deregulation of, and withdrawal from, the market be constrained by market failure, public management will be possible only within a framework of political networks that lays the foundation for the effective horizontal coordination of interests and builds relationships between those public and private participants that need access to each other's resources.[11] Political networks can also be conceptualised as the complex and dialectic relationships between the various interdependent entities involved in policy formulation and implementation.[12]

Several taxonomies of the key components of political networks are encountered in the political science literature. Examples include the following:

- Interdependence: Networks function because of the existing interdependencies of their members.
- Diversity of membership: The members may be diverse, but the network has neither a leader nor a dominant member.
- Diversity of objectives: Each member has its own objectives, which are not necessarily identical to, or compatible with, those of any other member.
- Stability. Continuity is a defining feature of networks and their members are engaged in repeated activities.
- Common standards: Every network member recognises and undertakes to observe certain agreed standards.[13]

Another taxonomy characterises global networks as having the following shared features:

9 Ibid.
10 T. Börzel, 'What's So Special About Policy Networks? An Exploration of the Concept and Its Usefulness in Studying European Governance', *European Integration Online Papers,* vol. 1, iss. 16, 1997, p. 1, http://eiop.or.at/eiop/texte/1997-016a.htm (accessed 3 October 2021).
11 Ibid, p. 6.
12 F. Cengiz, *Antitrust Federalism in the EU and the US,* London, Routledge, 2013, p. 26.
13 S. Wilks, 'Understanding Competition Policy Network in Europe. A Political Science Perspective', in C.-D. Ehlermann, I. Atanasiu (eds), *European Competition Law Annual 2002. Constructing the EU Network of Competition Authorities*, Oxford, Hart, 2005, p. 65.

- Their membership is drawn from a variety of public and private spheres, combined in such a way as to enable joint decision-making.
- They are distinguished from ad hoc meetings and market coordination by having a certain degree of institutionalisation and durability.
- Their members are legally independent and operationally autonomous, despite their involvement in the network.
- They are essentially voluntary coordination and negotiation processes intended to achieve specific political ends.
- They are intended to achieve or reinforce a public good.[14]

These classifications denote separate characteristics, despite there being significant overlap between them. This evidences a lack of agreement as to what constitutes a comprehensive definition; although certain components and features must be acknowledged as common, such as the interdependence of officially self-contained members whose collaboration is durable and institutional, and aimed at achieving a common good. It may be inferred from the above arrangements that the social sciences regard a network as a horizontal structure formed by independent and formally equal entities. Contributing to such a structure is technically voluntary, although it could be the natural outcome of existing collaboration between the entities forming it. Moreover, the voluntary nature of their cooperation may give the somewhat false impression that the entities are aware that cooperation is the only way to realise the interests of individual and/or group members. The officially equal status of each member means that networks are set up and held together by trust and informal social rules, rather than by formal rules backed by sanctions. Many of these observations will be of assistance when formulating the jurisprudential conceptualisation of a network.

2.2 The concept of a network for legal purposes

A network is not a legal concept *per se*.[15] It has been adapted for legal use and inserted into the framework of the particular branches of law that have made use of it for regulatory purposes. At some point, the network concept entered into legal and administrative studies as well. Due to the largely interdisciplinary nature of the task at hand and the strong links between the determinations of administrative law theory and administration science on the one hand and those of the other social sciences on the other, it is worth combining these research perspectives in order to arrive at a better understanding of the concept of a network and its significance for government administration and administrative law relationships.

The establishment of, and participation in, networks on the part of administrative agencies is a topic of interest to administrative law. In this field of study,

14 M. Eilstrup-Sangiovani, 'Global Governance Networks', in J.N. Victor, A.H. Montgomery, M. Lubell (eds), *The Oxford Handbook of Political Networks*, Oxford, OUP, 2018, p. 691.

15 G. Teubner, *Networks as Connected Contracts*, Oxford, Hart, 2011, p. 73.

networks of administrative authorities can be considered a specific structure (as opposed to a hierarchy and free-market organisation) for managing public affairs in an environment characterised by dispersed centres and a great deal of functional diversification. These sorts of networks can combine public and private entities nationally and public administrative entities from various jurisdictions transnationally. Transnational regulatory networks predominantly consist of national regulatory bodies, but are open to regulated entities. They often operate informally, building on and expanding the best practices and procedures employed in a given sector of the economy.[16] Moreover, they are typically informal; loosely structured; built on dialogue, experience exchange and learning; and predisposed to creating general operating standards for horizontally arranged platforms.[17]

Transnational administrative networks are a cooperative arrangement among government administrative bodies. They are characterised by special and particular features: specifically, they are non-hierarchical, informal structures that enable national administrative bodies to join forces in regulating a particular realm of social life by exchanging information, coordinating joint activities and stipulating common rules.[18] Each member is independent; but it is in each member's interests to share its resources (including information) with other members, as they have all have – at least in principle – an interest in the ultimate success of their collaboration. At the same time, no member has the power, resources or legal authority to pursue particular activities or to implement specific policies on its own account, especially in the international sphere.[19] An administrative network is an organisational structure that enables the autonomic entities that comprise it to establish multilateral relationships and coordinate their regulatory activities. Transnational networks are characterised by voluntary involvement that frequently crosses the line of demarcation between governmental and non-governmental, and national and foreign. Administrative networks are distinguishable from other forms of cooperation between government administrative bodies by virtue of two distinctive features. First, every component is self-sufficient and could achieve the functions assigned to it without the assistance of the network. Second, the involvement of many diverse entities in establishing the network does not lead to the creation of a hierarchically structured arrangement.[20]

16 B. Eberlein, 'Policy Coordination without Centralization? Informal Network Governance in EU Single Market Regulation', in C.-D. Ehlermann, I. Atanasiu (eds), *European Competition Law Annual 2002*, p. 143.

17 K. Nowrot, 'Towards "Open" Transnational Administrative Networks. Emerging Structural Features', in O. Dilling, M. Herberg, G. Winter (eds), *Transnational Administrative Rule-Making. Performance, Legal Effects, and Legitimacy*, Oxford, Hart, 2011, p. 259.

18 M.J. Warning, *Transnational Public Governance. Networks, Law and Legitimacy*, Basingstoke, Palgrave, 2009, p. 40; and J.P. Terhechte, *International Competition Enforcement Law Between Cooperation and Convergence*, Heidelberg, Springer, 2011, p. 14.

19 D.K. Tarullo, 'Competition Policy for Global Markets', *JIEL*, iss. 2(3), 1999, p. 447.

20 M. Zinzani, *Market Integration through 'Network Governance'. The Role of Networks of Regulators*, Cambridge/Antwerp/Portland, Intersentia, 2012, p. 21.

A transnational network can also be understood as a transgovernmental group that enables national regulatory bodies to formalise, regulate and coordinate those of their multilateral relations that are directed towards managing the many essential areas of social life – such as banking, the stock market, insurance, energy, gas, the mass media and consumer protection.[21] The essential distinguishing features of these bodies – that is, those that enable the creation of the network – are their narrow specialisation and often expert nature. This is because – as has been noted – a community of entities with specialist knowledge, which exercise their administrative jurisdiction according to common normative and political guidelines, is a precondition for establishing durable relationships in a transnational network. Over the long term, this is transformed into a community of objectives shared by the collaborating national public administrative bodies.[22]

Cooperation between administrative authorities in a network is often intensive, albeit limited, but nevertheless long term.[23] As paradoxical as it might seem, the intensity and long-term nature of this cooperation go hand in glove with its limited scope (relative to the entire range of activities undertaken by national public administrative authorities). International cooperation constitutes only a certain portion of the activities of administrative bodies, however significant that portion might be; and their core activities are associated with the exercise of their national jurisdiction. From the perspective of legal science, cooperation between administrative bodies involves much more than sitting down together to discuss matters of mutual concern in order to qualify as a network. The regular interchange between heterogeneous entities that are interdependent and which complement each other produces synergistic results, as it forms the basis for making joint decisions that would not be feasible without the network.[24] The result is that the concept of a network is an ordering agent for institutional and organisational relationships between administrative entities and a contributing factor in abandoning hierarchisation and decentralisation (as conventionally understood).[25]

2.3 The concept of a transnational competition network

Given the characteristic features of transnational networks, as described above, it is safe to say that a TCN constitutes an institutionalised and legally diverse form of transnational interaction between national competition authorities (NCAs): one

21 M. Maggetti, F. Gilardi, 'The Policy-Making Structure of European Regulatory Networks and the Domestic Adoption of Standards', *JEPP*, vol. 18, iss. 6, 2011, p. 830.
22 M. Fenwick, 'Regulatory Networks, Population Level Effects and Threshold Models of Collective Action', in M. Fenwick, S. Van Uytsel, S. Wrbka (eds), *Networked Governance, Transnational Business and the Law*, Berlin/Heidelberg, Springer, 2014, pp. 87–89.
23 Ibid.
24 K.-H. Ladeur, 'Towards a Legal Theory of Supranationality. The Viability of the Network Concept', *ELJ*, vol. 3, iss. 1, 1997, p. 47.
25 I. Niżnik-Dobosz, 'Współdziałanie jako pojęcie redefiniujące administracyjne prawo ustrojowe', in B. Dolnicki (ed), *Formy Współdziałania jednostek samorządu terytorialnego*, Warsaw, WK, 2012, p. 162.

that is essentially non-hierarchical and which is implemented with the assistance of legally and substantially diverse forms of cooperation between NCAs on competition matters. This might seem a fairly expansive definition, but every element is crucial if a network is to be described with exactitude and distinguished from other forms of transnational cooperation of NCAs. It is therefore worth briefly discussing its individual elements so as to arrive at a better understanding. This is a working and operational definition, and its constituent parts are described and examined in subsequent chapters.

First, a TCN is a form of interaction among NCAs. Usually, it does not constitute a sophisticated organisational formation due to its frequently informal nature. Even when a network functions as part of an existing international organisation, limited non-executive organisational arrangements are put in place for the sole purpose of serving the network. Moreover, a network does not constitute some form of legal activity on the part of the NCAs that comprise it, as it is not a formalised and clearly defined legal institution; and it does not affect the extent of their competition jurisdiction. The legal nature of a network is therefore best described with recourse to the concept of interaction as the various kinds of connections that can be observed in the administrative apparatus.

Second, the interaction between NCAs is institutionalised. This means that networks are not transitory, have an external aspect and are relatively stable; and that the activities conducted within them are recurrent. This is what distinguishes networks from isolated cases of cooperation among NCAs that do not necessarily result in the establishment of long-term bonds. Institutionalisation additionally implies that NCAs are willing to establish networks in their desire to lend their cooperation an external complexion and lend it durability. Obviously, this does not guarantee that a network will be successful. Changes in the political or economic environment, or institutional or personnel changes, can sap the will to continue with it.

Third, TCNs are an assortment of legally and substantially diverse forms of cooperation among NCAs. They constitute a flexible form of organisation in their very essence. Moreover, the limited legal bases for setting up and running most networks mean that members can more or less voluntarily decide on the extent of their cooperation and the forms it will take. These forms will mostly be dictated by the purposes for which the particular network is established; although these purposes, as well as the means by which they are achieved, can evolve as the network develops. Most forms of cooperation will undoubtedly be consensual and informational in nature, due to the informality of networks. This is not to say, however, that informational forms of cooperation will be of no legal relevance. By shaping administrative policy, they can indirectly influence the exercise of administrative jurisdiction. Cooperation via a network can assume several forms whose scope can vary greatly, from loose ties to intricate associations. The implication is that TCNs are a certain phenomenon in the area of cooperation among NCAs and not a uniform legal institution. In this context, cooperation among NCAs should apply to all of their legal and substantial relationships within the transnational network. In the simplest definition of a 'network', 'interaction' describes its essence;

whereas 'cooperation' describes the relations between its 'nodes' – that is, between NCAs. These relations – that is, forms of cooperation – can vary considerably in their nature and extent. Their mere existence, however, is what makes a network a durable structure held together by cooperation. Their purely functional and flexible nature makes networks adaptable to the wants and needs of their members. This translates into highly diverse legal and substantial outcomes. Designating this sort of cooperation between NCAs as a TCN can therefore fail to precisely and unambiguously identify the type of network in question or to clarify its possible legal implications. For this reason, the classifications that have been devised should always be used to specify the type of network. The major types are enumerated further below.

Fourth, TCNs are transnational in scope. This should be understood two ways. It mostly concerns the fact that they extend across borders, and that NCAs from several countries are therefore involved in creating them. It follows that this cooperation is not a feature of the connections and associations that exist in any one nation's public administration, and that national competition law only partially regulates this sphere of activity. Note further that the designation 'transnational' is used, as opposed to 'international'. This is not meant to denote official international contact between presidents, governments or foreign affairs ministers of member states; but rather direct contact between their competition authorities, which are not vested with any authority to speak or act on behalf of their respective nations in order to carry out their functions. There may be occasions when NCAs act as representatives of states and present the national government's stance on certain issues; but these usually arise outside networks on other formal and decisive international fora.

Fifth, networks involve interaction between competition authorities. By definition, this is limited to national public administrative bodies whose basic function is to enforce competition laws. TCNs must therefore be distinguished from private and public-private networks, as network cooperation that traverses national borders is a much broader phenomenon that not only involves NCAs. In some areas of the economy, networks of private entities even assume a leadership role (eg, standardisation and banking); while public administrative bodies are merely the recipients of their determinations.

Sixth, TCNs are a form of non-hierarchical interaction. The absence of hierarchical connections appertains both to the essence of the network as an organisational structure and to the interactions across it as bonds in the public administration system. This feature will be constitutive in the vast majority of cases. However, this does not mean that vertical (ie, hierarchical) relations cannot appear in network structures. The literature on this topic stresses that networks should not be limited exclusively to the non-hierarchical relations involved in horizontally coordinating the activities of peer-to-peer regulatory bodies, as they can also be pivotal to vertical coordination in multi-level regulatory systems.[26] This is only one aspect of vertical relations. For example, it might indicate the

26 W. Kerber, J. Wendel, 'Regulatory Networks', p. 3.

possibility of a member having the final say on a resolution in clearly defined situations, but it does not determine the essential nature of the network setup – which is, in principle, a non-hierarchical way of arranging the relations between public administrative bodies.

Seventh, the interaction between NCAs in networks is restricted to competition matters. Unlike general contacts between countries, the range of issues covered by cooperative NCAs is limited to their subject-matter jurisdiction. Network members are specialist competition authorities and are often vested with a great deal of political independence and autonomy in creating administrative policy and exercising competition jurisdiction. The result is that TCNs are specialist and often expert in nature. This narrow range of activities is conducive to a homogeneous membership, enables similar requirements to be better understood and provides for results that are satisfactory to all members.

2.4 Types of transnational competition networks

TCNs are heterogeneous and fluid, fairly seldom subject to official regulations and most often the result of an increasing requirement for international cooperation between administrative bodies. The different classifications of transnational networks highlight certain features common to specific kinds of networks, thereby facilitating the analysis of TCNs. These classifications are not a purely theoretical distribution. They make it easier to identify the crucial and constitutive components of TCNs, and to set up frameworks within which to analyse them. It should be stressed that identifying a structure as a TCN does not, of itself, say anything about its purpose, the responsibilities of its members or the distribution of power or independence within it.[27] For this reason, a proposal with six criteria has been formulated to enable a basic analysis of the constitutive features of every TCN.

2.4.1 The scope and purpose of network activities

TCNs are principally subdivided by classifying them according to purpose.[28] Based on this taxonomy, the following types of networks can be distinguished:

- Informational networks: These facilitate the exchange of information among NCAs. Political networks are a special kind of informational network whose basic task – made possible by information exchange and non-binding agreements – is to exert specific political pressure on other entities. This category is the most common for TCNs and involves networks such as the International Competition Network (ICN), the African Competition Network or the Arab Competition Network.
- Administrative networks: These strengthen administrative cooperation between NCAs in the exercise of administrative jurisdiction across national

27 M. Zinzani, *Market Integration*, p. 21.
28 A.M. Slaughter, *A New World Order*, pp. 51–52.

borders. The Nordic Cooperation and European Competition Authorities (ECA) may serve as examples.

- Harmonisation networks: These aim to align regulatory standards by fostering the uniformity and normalisation of national legal regulations. The best example of such a network is the European Competition Network (ECN).

Informational networks have a precarious existence. They are easy to set up, but enthusiasm can quickly wane unless ideas, funds and support remain forthcoming (eg, the Central European Competition Initiative (CECI) and the Marchfeld Competition Forum). The maintenance and development of an informational network therefore depend on the continued interest of its members, and their willingness to invest the time and money required to achieve the network's intended purpose(s).[29] Administrative and harmonisation networks usually have a more solid legal foundation, and the NCAs involved are often more resolute. Administrative and harmonisation networks additionally require greater outlays. NCAs that have invested considerable time and money in them may therefore be disinclined to abandon them. This division is not disjunctive, as networks can serve many purposes. Moreover, their constitution and features can change over time – for example, networks set up as informational networks can be converted into harmonisation networks.

The types of TCNs enumerated above depict subsequent stages of sophisticated cooperation – from the simplest soft cooperation to cooperation during proceedings, and to the eventual approximation of national legislation. At the same time, this division is necessarily somewhat arbitrary, as political, judicial and legislative activities cannot be completely separated on account of their interdependence and the convolutedness of their stated purposes. No less relevant is that a network can perform several functions, which in turn can change over time. As an example, the ECN began as an informational and administrative network, but became a harmonisation network over time. A network need not be permanently categorised on account of the purpose(s) initially ascribed to it. In this respect, a network's development path and external factors can also result in far-reaching changes. The network's role can evolve due to fundamental changes in perceptions of how the law should be implemented. Changes to European competition law and the increasingly elaborate cooperation in European competition networks are the best evidence of this.[30] Moreover, these processes are continuous and ongoing. Transnational networks either expand or are reconstituted as, for example, EU agencies.[31]

29 I. Maher, 'Competition Law in the International Domain. Networks as a New Form of Governance', *J.L.& Soc.*, vol. 29, iss. 1, 2002, p. 118.

30 P. Craig, 'Shared Administration and Networks. Global and EU Perspectives', in G. Anthony, J.-B. Auby, J. Morison, T. Zwart (eds), *Values in Global Administrative Law*, Oxford, Hart, 2010, p. 91.

31 While this has yet to affect NCAs, European regulatory telecommunications and energy networks are instructive examples of this sort of transformation.

2.4.2 Relations among network members

Another important division concerns relations among network members. Networks are non-hierarchical by nature and are predicated on the formal equality and independence of their members. However, in practice, TCNs can deviate from these principles. Some members are undeniably better resourced and better positioned. Setting up a network is a political process involving the interaction of resources and influence. The best-resourced and most influential members can attempt to have this state of affairs formalised by demanding that their special status in the network be duly recognised.[32] For this reason, true horizontal networks can be distinguished from those with vertical features. As long as the vertical features of the cooperation among NCAs comprise only a limited component of this interaction, we are still dealing with a network. Instituting rigid hierarchical relations is tantamount to setting up a head office and branch structure, even if it operates transnationally.[33]

The primary model of a TCN is a horizontal one, in which independent peers work voluntarily together. Obviously, formal equality does not preclude some members from having a greater influence on the network's operation than others. This depends largely on financial commitments, but even more so on the knowledge and information transmitted through the network to other members. As information is the glue that binds every network, its rapid dissemination is crucial. This makes it theoretically possible to have the network driven by soft power. In lieu of a formal enforcement mechanism, soft power lies in the fact that the network member that provides and manages a piece of information can achieve its purpose by controlling its circulation, while gaining influence over the members that require it.[34] As networks are often informal, information and knowledge are a vital source of power and influence. Therefore, those network members that possess and provide information inevitably become the key members.[35] TCNs are still evolving, especially in the European Union. Horizontal networks (associating the homologous authorities of EU member states) are particularly dynamic. The European Commission has been attempting to incorporate these networks into its system of multi-level European administration, and to strengthen them by enhancing their formal status and vesting them with the authority needed for the effective transnational implementation of European law. The European Commission has acted as a catalyst for these changes by closely monitoring network members and not hesitating to reinforce NCAs to improve the implementation of European law. These changes have major implications for NCAs, as their authority has been expanded at the cost of their autonomy *vis-à-vis* EU entities. Greater authority therefore comes with greater responsibilities to the executive power (the

32 S. Wilks, 'Understanding Competition Policy Network', p. 65.

33 The simplistic term 'vertical network' is often used to describe these structures in the literature, despite its ambivalence and its failure to completely convey their essence.

34 R.O. Keohane, J.S. Nye, 'Power and Interdependence in the Information Age', *Foreign Affairs*, vol. 77, iss. 5, 1998, p. 86.

35 I. Maher, 'Competition Law in the International Domain', p. 118.

European Commission). Both vertical and horizontal elements are noticeable. The complex administration of the European Union is a specific aggregation of this type of network. This comprises several horizontal networks (eg, the EU Merger Working Group (MWG)), but also several others with vertical components (eg, the ECN). Networks need not be strictly limited to the non-hierarchical relations that result from the horizontal coordination of the functions of homologous regulatory authorities; vertical coordination can play an equally important role in a multi-level regulatory system.[36] The functional, but not hierarchical or administrative, dependence of national authorities on the European Commission can also be discussed in this context.[37] European regulatory networks, then, constitute something of a departure, in that they accord a special status (which can vary depending on the type of network) to the European Commission, which has come to be dubbed the 'spider in the web', despite the lack of hierarchy being an essential feature.[38] This also indicates that networks with vertical elements are usually equipped with the means to compel members to subordinate their decisions and arrangements to the network.[39] This also indicates that transnational networks are not homogeneous, but highly diverse. As mentioned at the outset, networks can have vertical elements, but these cannot comprise the essence of the associations between their members. Vertical connections are typically brought into play only in exceptional situations – for example, when one network member can imperiously impose its will on the others. They play no part in the day-to-day operations of the network, but are a special last resort to handle extreme situations. The experience of regional and European competition networks clearly shows that in the long term, any attempt by a member to autocratically control the network brings about a collapse in confidence; reduces willingness to work together through the network; encourages uncoordinated activities on the part of members; and hinders the overall implementation of legal regulations for which the network is responsible.[40] This demonstrates that the operational efficiency of a network with vertical elements requires that the essence of the relations in the network be preserved; and that influence be exerted informally, with the use of the authoritative formal measures available to privileged members reserved for exceptional situations. It is also difficult not to notice that vertical elements in a network can be treated as a step towards transforming networks into hierarchical transnational administrative structures.

36 W. Kerber, J. Wendel, 'Regulatory Networks'.

37 M. Szydło, 'Relacje pomiędzy komisją europejską a krajowymi organami regulacyjnymi. czy nowy model administracji europejskiej?', in Z. Janku, Z. Leoński, M. Szewczyk, M. Waligórski, K. Wojtczak (eds), *Europeizacja polskiego prawa administracyjnego*, Wrocław, Kolonia Limited, 2005, p. 212.

38 J.P. Terhechte, *International Competition Enforcement Law*, p. 15–16.

39 I. Maher, 'Regulation and Modes of Governance in EC Competition Law. What's New in Enforcement?', *FILJ*, vol. 31, iss. 6, 2007, pp. 1731–1732.

40 U. Böge, 'The Bundeskartellamt and the Competition Authorities of the German Lander', in C.-D. Ehlermann, I. Atanasiu (eds), *European Competition Law Annual 2002*, p. 117.

2.4.3 Placing networks in existing institutional treaty structures

TCNs do not materialise in an institutional and legal vacuum. Having observed many networks, it is apparent that a TCN can be set up using existing structures – for example, an international organisation or the terms of an international treaty; or it can be a completely new structure that does not directly benefit from the existing institutional and legal environment. Obviously, even if the new structure is set up outside the confines of functioning networks and international organisations, it must factor in the existing institutional and legal architecture. However, this has more to do with competing for the resources of potential network members and having to assign distinctive features to the forms of interaction in the given network in order to attract and retain entities that are interested in international cooperation.

Three kinds of transnational networks can be identified on account of having networks placed in existing institutional and treaty structures:

- transnational networks set up in accordance with existing international organisations. These have been observed to make use of the existing international organisational structure, treating it as the 'spider in the web' in which they are 'caught' and which they use to conduct their operations;[41]
- networks set up pursuant to international agreements between nation states; and
- networks set up *ad hoc* as formal structures in response to a need to resolve mutual problems through cooperation. In some situations, the members act sufficiently independently as to require the institutionalisation of their cooperative activities within the transnational organisation.

Significantly, these three types of network are interrelated. Some appear to be part of existing international organisational structures, although in reality, they only use them for their own operations. Others, by contrast, compete directly with international organisations either which currently exist or which may do so in the future.[42]

Placing a network within an existing institutional and treaty structure invariably results in its formalisation. Entities that work together as part of such a network must accept the established organisational and legal forms of cooperation in order to benefit from existing legal and institutional solutions. At the same time, however, formalisation often facilitates far-reaching forms of cooperation, and even the adoption of binding statutes.[43] Networks set up outside the existing international institutional and treaty framework are more flexible and frequently open; but at the same time, the cooperation within them is often less developed. By their very nature, the members of informal networks may not exercise competition

41 S. Picciotto, 'Networks in International Integration. Fragmented States and the Dilemmas of Neo-Liberalism', *NJILB*, vol. 17, iss. 1, 1997, p. 1039.

42 A.-M. Slaughter, *A New World Order*, p. 45.

43 The guidelines for competition networks drawn up by the OECD and subsequently adopted by the OECD Council are a case in point. These are formally binding on the organisation's member states.

jurisdiction, as such activities require an unequivocal formal legal basis. As a result, some forms of cooperation – especially enhanced cooperation, as analysed in Chapter 8 – are reserved to formalised competition networks.

2.4.4 Formalising the initiation and operation of networks

The secondary classification described in the previous point subdivides TCNs according to the degree to which their initiation and operation are formalised. This makes it even more difficult to extract separable classes of networks. Formalisation should therefore be treated as a gradable feature, so that when distinguishing formalised from informal networks, there is a broad continuum between these two extremes.

The formalisation of TCNs must be seen in three dimensions: the legal bases of their initiation, their means of operation, and their organisational structure. Formalisation will proceed furthest in networks that operate within existing international organisations. This is a corollary of the fact that these organisations are established and operate under traditional and strongly formalised international legal instruments. These networks are legally underpinned by multilateral international agreements, which translate into the organisations and structures being formalised, along with their legal forms and actual operation. Networks operating outside international organisations are much more flexible. They are not initiated by formal international legal instruments, but rather as a result of the role of administrative authorities and the agreements to which they are signatories, a common declaration or some other implicit form of operational agreement. There is seldom a top-down specification of the structure or form of operations in these cases, as everything is left to current requirements.

The manner of concluding an agreement to set up a network will determine its organisation, structure and forms of operation. Its organisation and structure may be determined by the international organisation under whose auspices it functions. The members of other networks can voluntarily and independently decide on the form which their cooperation will take. Some variants of network topologies have no authorities and their only form of organisation is member meetings (eg, the ECA, the CECI). In addition, there may be a meeting with a secretariat (even a virtual secretariat) that coordinates the functions of the network (eg, the ICN); or one of the members may be vested with organisational functionality (eg, the MWG). Some networks (eg, the ICN) appoint a chair; and the chair of a permanent network body that functions as part of the network fulfils other representative functions (eg, the Organisation for Economic Co-operation and Development (OECD Competition Committee). The nature of a network, however, is such that an autocratic managerial body cannot play a significant role, and a collective deliberate body or authority is essential. This sort of administrative body is selected by all members *in pleno*. The appointment of permanent or temporary working groups is common; in fact, most of a network's operations are performed by working groups.

The legal forms of a network's operations will depend on its legal mandate. The formal status of a network can result in its being empowered to create formal instruments, but only those adopted by a competent conference of an international organisation (eg, decisions issued by the OECD Council)[44] will be legally binding. Recommendations and other concerted practices approved within the forum of the network have the status of soft law instruments or informational or educational documents. The actual operation of the network includes every form of contact (eg, conferences, seminars, workshops, teleconferences and webinars).

The literature also shows that the formalisation and expansion of a network's organisational structure will be impacted by its specific objectives and legal forms of action. Networks in which informal instruments predominate, and whose primary form of action is the resolution of soft law acts, will have simpler, less formalised structures. Networks with legal instruments of administrative cooperation typically have more formalised and complicated internal structures.[45]

2.4.5 Territorial range of network activity

Subdividing networks by the territorial reach of their operations seems simple and obvious. TCNs obviously transcend national boundaries. However, they vary according to the territorial reach of their operations. Global, continental and regional networks can be differentiated on the basis of the territorial reach of their members. There are no territorial constraints on the membership of global networks. They can potentially comprise administrative bodies from every continent (eg, the OECD, the United Nations Conference on Trade and Development (UNCTAD) and the ICN). Continental networks are responsible for promoting integration in continents and subcontinents (eg, the ECN, the Asia-Pacific Economic Cooperation and the Association of Southeast Asian Nations). Regional networks comprise regional administrative bodies (eg, CECI, the Nordic Cooperation, the Marchfeld Competition Forum). There are also hybrid types where the territorial criterion is secondary to the historical and cultural connections between the bodies that make up the network; the most illustrative examples are the Lusophone Competition Network and the Ibero-American Competition Network. In most cases, however, the type of transnational network will be identified primarily on the basis of the territorial criterion.

Differentiating networks according to the relatively simple criterion of territorial reach can obscure major differences in their make-up. An increase in membership often comes with an increase in territorial reach,[46] with the result that the network's procedures and practices must be very flexible. These networks are predominantly informational. They may have harmonisation elements, but they can hardly be

44 However, the OECD Council has not issued a decision on competition matters since the 1970s.

45 S. Salvador Iborra, A. Saz-Carranza, X. Fernández-i-Marín, A. Albareda, 'The Governance of Goal-Directed Networks and Network Tasks: An Empirical Analysis of European Regulatory Networks', *JPART*, vol. 28, iss. 2, 2018, p. 284.

46 The closed network functioning in the OECD is something of an exception.

expected to be administrative. Transnational networks evince significantly more advanced forms of cooperation at the continental and regional levels. It should be emphasised that transnational administrative networks are at their most developed in the European Union; these EU networks are far more advanced than those in other international organisations.[47] The narrower the geographical area covered by the network, the greater the likelihood that its members will be homogeneous and share common interests, with the result that the network will be effective. For their part, subcontinental networks may be able to claim historically good relations and re-establish close forms of erstwhile cooperation. However, a common history and/or culture does not necessarily translate into effective cooperation, as the CECI fiasco amply demonstrates.[48]

2.4.6 Network membership

TCNs may be open or closed to new members. Most TCNs are not very formalised and their members are independent homologous peers. However, informal does not necessarily mean open. In this context, openness has a double dimension, in that it touches on the issues of the type and quality of membership and whether entities which are not involved in public administration should be allowed to participate (freely or subject to restrictions) in the functions of the network. The former issue is limited in scope and concerns the network's structure and internal organisation. The latter mainly concerns its internal procedures and the activities in which it is engaged.

Networks can be open or closed, depending on whether they receive new members. As a rule, networks that function within international organisations (eg, the OECD) or regional organisations (eg, the European Union) are closed, with membership restricted to members of the relevant organisation. In this situation, NCAs from non-member states are often granted observer status. This allows for outside entities to be admitted to contribute to the running of the network. On the one hand, this allows observers to state their positions; and on the other, it extends the impact of the network to third parties. However, not even these ancillary membership categories can alter the fact that closed networks have fewer members by their very nature. Nor is every country interested in ancillary membership. Open networks impose no restrictions on membership; any NCA that accepts the network's operating principles is eligible to join. These networks are usually formalised to a low or medium extent (eg, the ICN), although there are exceptions (eg, UNCTAD). Once again, formalised to a low extent does not imply openness, as illustrated by the European MWG and the ECA. The strength of the open network model is its universality. The involvement of as many entities as possible significantly increases the scope of network interactions.

47 M. Savino, 'The Role of Transnational Committees', p. 3.

48 The Nordic Cooperation provides a strong counterexample; as, to a lesser extent, does the cooperation between the NCAs of the Baltic states. These are two positive examples of strong cultural and administrative ties.

Openness may mean that a TCN will allow people who are not involved in public competition administration – for example, academics, businesspeople and professional representatives – to contribute to its operations. They will usually be regarded as advisers, but will be able to contribute to most of the network's operations. The most open network in this regard is the ICN, where the input of advisers is of prime importance. They are not network members, although they frequently participate in its operations on an equal footing with administrative bodies. An interesting example in this regard is the OECD. Because of its highly restricted and exclusive membership, the organisation seeks to expand the legitimacy of its activities by inviting businesspeople and representatives of professional and academic associations to its working committee meetings. In addition, new structural models in the form of global forums on, for example, competition are established, with a view to having the network's influence embrace public administrative authorities in non-OECD countries. Generally, however, most networks remain closed in this sense. This is a source of criticism, and may justify charges that the network lacks accountability and that its actions lack legitimacy.

Yet another factor worth heeding when discussing network membership is that the members should exhibit considerable homogeneity,[49] as they can only work together effectively if they are sufficiently homogenous. A certain regularity can be observed in this regard, in that the more formalised and administrative the network, the greater the pressure on members to become homogeneous. Indeed, certain standards of, for example, competence and independence must occasionally be met to achieve the desired level of uniformity. To this end, the extent to which the competencies, regimes, and procedures of members are to be harmonised is imposed by law on many European administrative networks. By contrast, informal and virtual networks, such as the ICN, do not impose special constitutional or jurisdictional requirements on their members. Affiliation with these networks results in a certain degree of convergence that gradually makes the membership more homogeneous.

2.5 Concluding remarks

Legal science borrowed the network concept from the social sciences to describe certain social phenomena in terms of social relations organised as networks, but has yet to fully adapt it. Given its complexity, the network concept was never going to be speedily transplanted into legal science. As the legal order stands on its own, elaborating suitable legal standards to describe social phenomena is bound to take a certain amount of time.[50] The diversity of the various branches of law adds another layer of difficulty to understanding the network concept and may affect its

49 J. Agudo Gonzalez, 'The Cooperative Administration in the Internal Market. In Search of a Typology', in F. Velasco Caballero, F. Pastor Merchante (eds), *The Public Administration of the Internal Market*, Groningen, Europa Law Publishing, 2015, p. 249.

50 H. Collins, 'Introduction to Network as Connected Contracts', in G. Teubner, *Networks as Connected Contracts*, p. 18.

applicability to particular branches of law. Competition law does not seem to have created a normative conception of an administrative network; and for this reason, the network concept is largely the preserve of legal language and predominantly a creature of jurisprudence.

Competition networks are an increasingly important form of public administrative organisation. The potential of network organisation is recognised in many areas of social life and is studied in many of the exact, natural and humanistic sciences. The attractiveness of this model lies in its simplicity, its adoption of mutual autonomy and equality, and the clear benefits that derive from mutual relations and cooperation. The concept of network organisation has opened up new research areas in jurisprudence and is a potential alternative to the conventional and diametrically opposed centralisation and decentralisation administrative system frameworks. Moreover, networks are part of a notable trend away from government (identified with the rigid organisation of the state) and towards the governance of public affairs. Governance is an attempt to tap the hidden potential of the resources that are available to many network entities. The coordinated connection of these resources through the network, together with the lack of a command centre, facilitates the achievement of public goals. Networks really come into their own in promoting transnational cooperation between NCAs. The changing role of nations is especially apparent in this sphere, and the concept of multi-stage governance is increasingly becoming the basis on which the governance of public affairs is organised on the transnational level.

Competition networks are remarkably heterogeneous. Even the terminology is variegated. Every network definition put forward emphasises different components, compositions and purposes of different network structures. One feature common to many TCNs – of both the more formal variety (eg, the ECN) and the less formal or informal variety (eg, the ICN and the ECA) – is that their membership is comprised of NCAs, and not nations as a whole, as administrative authorities only comprise part of their complicated and multifaceted organisation. Third parties, such as representatives from the private sector and academia, are involved in, for example, the operations of the ICN, as well as public administrative bodies. The membership of these networks sometimes includes non-governmental advisers, but these are never in the majority and mostly assume an advisory rather than an executive role. Their presence ensures the legitimacy and improves the accountability of network operations. For these reasons, treating TCNs as informal international organisations[51] fails to explain the character of many loose and informal networks (eg, the African Competition Forum and the Marchfeld Competition Forum); and more importantly, it ignores the fact that some TCNs function under the umbrella of formal international organisations (eg, the OECD or UNCTAD) or within continental integration associations of states (eg, the ECN).

51 Ch. Townley, M. Guidi, M. Tavares, *The Law and Politics of Global Competition. Influence and Legitimacy in the International Competition Network*, Oxford, OUP, 2022, pp. 12 ff.

The proposed definition and classification of TCNs is meant to serve as a tool in the subsequent stages of this research. The formulated definition proposal is rather complicated; but it appears to be the only correct methodological approach, given the highly variegated nature of TCNs. It allows the object of study to be better delimited and underscores its most important constructive features. A TCN cannot be defined without referring to the ways in which networks are classified. In tandem, these comprise an effective research tool for analysing TCNs.

3 Global competition networks

Several transnational competition networks (TCNs) have a global reach. Most operate as part of, or under the patronage of, an international organisation. The International Competition Network (ICN) is an important exception. On the one hand, this preference for the particular institutional arrangements of worldwide transnational networks can be explained praxeologically; but political considerations cannot be discounted. Setting up, and especially maintaining, a worldwide network is obviously organisationally more difficult and requires a greater investment of resources than a smaller network. International organisations, by virtue of their stable structures and fixed budgets, would seem to be the natural backend for TCNs. In the case of the ICN, the participating national competition authorities (NCAs) have sought to surmount these difficulties by establishing a virtual organisation at the outset, and generally by defraying the operating costs separately (subject to the means of individual NCAs). However, the fate of networks functioning under the auspices of international organisations depends on the will of those organisations. As a consequence, when competition policy is removed from the agenda of a particular organisation, the network is doomed (as in the case of the World Trade Organization (WTO)). However, the plurality of global TCNs indicates that there is a visible need for global cooperation among NCAs, and that TCNs are good fora through which to establish and develop such cooperation.

3.1 Organisation for Economic Co-operation and Development

3.1.1 Origin and history

The Organisation for Economic Co-operation and Development (OECD) was formed on 14 December 1960 pursuant to the signing of a convention to that effect.[1] The OECD is the successor organisation to the Organisation for European Economic Cooperation (OEEC), which was formed on 16 April 1948 to

1 The Convention on the Organisation of Economic Co-operation and Development, together with Supplementary Protocols Nos 1 and 2 thereto, which comprise the entirety thereof, was executed in Paris on 14 December 1960, https://www.oecd.org/legal/oecd-convention.htm (accessed 24 July 2021).

DOI: 10.4324/9781003376002-3

administer the European Recovery Program under the Marshall Plan. The OEEC had 18 members.[2] The OEEC went beyond the mere distribution of aid and focused largely on building cooperation among member states from the outset. This cooperation included providing mutual assistance in developing national economic programmes for post-war reconstruction, lowering customs duties and other barriers to trade, and working on creating a customs union and a free trade zone.[3] These additional goals assumed particular importance once the Marshall Plan was terminated in 1952. The OEEC was one of the driving forces behind the formation of the European Economic Community (EEC) in 1957.[4] The EEC transformed into the OEEC, although the United States and Canada made efforts to endow the organisation with a new form. The OECD continued to pursue the aims of the OEEC and at the same time acquired new legal tools – in particular, the capacity to draw up international agreements and issue decisions that were binding on its member states.[5] The OECD was principally designed to facilitate dialogue between member states by serving as a forum for senior civil servants.[6]

The OECD was initially an exclusive club of Western economies that aimed to liberalise world trade and promote economic cooperation.[7] This operating model attracted other countries that shared the OECD's fundamental values, such as liberal democracy and free markets. Membership has increased to 38 countries over the ensuing decades and the organisation continues to grow.[8] Several other countries – including Argentina, Brazil, Peru, Kazakhstan, Malaysia and Croatia – have expressed a desire to join.

3.1.2 Legal basis

The legal basis for the OECD's activities is the 1960 Convention.[9] This document defines the OECD as an international organisation, enumerates the basic issues

2 Austria, Belgium, Denmark, France, Greece, Iceland, the Republic of Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Sweden, Switzerland, Turkey, the United Kingdom, the Federal Republic of Germany, and the Free Territory of Trieste (later incorporated into Italy).

3 OECD, Organisation for European Economic Co-operation, http://www.oecd.org/general/organisationforeuropeaneconomicco-operation.htm (accessed 24 July 2021).

4 M. Leimgruber, M. Schmelzer, 'From the Marshall Plan to Global Governance: Historical Transformations of the OEEC/OECD, 1948 to Present', in M. Leimgruber, M. Schmelzer (eds), *The OECD and the International Political Economy Since 1948*, Basingstoke, Palgrave Macmillan, 2017, pp. 33 ff.

5 M. Marcussen, 'OECD Governance through Soft Law', in U. Mörth (ed), *Soft Law in Governance and Regulation*, Cheltenham, Edward Elgar Publishing, 2005, p. 107.

6 Ibid, p. 103.

7 M. Schmelzer, 'A Club of the Rich to Help the Poor? The OECD, "Development", and the Hegemony of Donor Countries', in: M. Frey, S. Kunkel, C. Unger (eds), *International Organizations and Development, 1945 to 1990*, Basingstoke, Palgrave Macmillan, 2014, pp. 171 ff.

8 P. Carroll, A. Kellow, *The OECD. A Study of Organisational Adaptation*, Cheltenham, Edward Elgar Publishing, 2005, pp. 121 ff.

9 OECD, Convention on the Organisation for Economic Co-operation and Development, https://www.oecd.org/legal/oecd-convention.htm (accessed 24 July 2021).

related to its activities and specifies the rights and obligations of its members. The OECD independently determines its internal organisation, including the units responsible for cooperation and managing the competition network.

3.1.3 Network aims

Article 1 of the 1960 OECD Convention states that the aims of the organisation is to promote policies designed:

a to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy;
b to contribute to sound economic expansion in Member as well as non-member countries in the process of economic development; and
c to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations.[10]

The OECD's cooperative objectives were broader than the OEEC's in terms of promoting free markets over central economic planning. This had particular historical significance when the Convention was signed.

The OECD defines its mission as promoting policies intended to improve economic and social conditions all over the world by creating a forum where governments can exchange expertise and experience; discuss solutions to common problems; analyse changes in economic, social and environmental conditions; collect and compare data in order to predict future trends; and adopt international standards on a wide range of issues, from agriculture to taxation and chemical safety.[11]

Curiously, the OECD Convention has nothing to say about the justness of protecting free competition. However, the soft law acts adopted in the OECD forum highlight the need for the organisation to take action in this area. OECD Council recommendations recognise that the effective implementation of competition policy is crucial to promoting world trade, as it ensures that domestic markets remain robust and encourages the lowering, or even elimination, of barriers to entry (eg, tariffs, quotas);[12] and that anti-competitive practices and mergers impede economic growth, the expansion of trade and other economic goals of both OECD and non-OECD countries.[13] The OECD Competition Committee

10 Ibid.
11 OECD, About the OECD, http://www.oecd.org/about/ (accessed 24 July 2021).
12 Recommendation of the Council for Co-operation between Member Countries in Areas of Potential Conflict between Competition and Trade Policies, 23 October 1986, http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=190&InstrumentPID=186&Lang=en&Book= (accessed 3 May 2021).
13 Recommendation of the OECD Council concerning International Co-operation on Competition Investigations and Proceedings, 16 September 2014, https://www.oecd.org/daf/competition/international-coop-competition-2014-recommendation.htm (accessed 24 July 2021).

has operated almost since the beginning of the organisation's existence and is one of its most active and prestigious bodies. This confirms the importance of competition protection to the organisation.

3.1.4 Membership

The OECD currently has 38 member states, each of which accepts the OECD's aims as set out in the Convention. Applications for membership must be approved by all member states. The OECD has member states from every continent except Africa, although Europe dominates. The OECD remains open to new members, although it attempts to increase its influence on countries outside its small group of member states by offering them other ways to participate in its work. Many countries not associated with the OECD have observer status. This entitles them to participate in OECD working group sessions and international forums. The OECD has additionally recognised the special significance of the BRICS countries[14] and their neighbours by offering Brazil, India, China, South Africa and Indonesia key partner status and programmes to strengthen their involvement. These programmes directly encourage these countries to genuinely participate in the OECD's work without becoming official members.[15]

To a significant degree, the OECD's procedures for accepting new members have always been the result of a political game of interests. This is clearly visible in the successive waves of new members. This also partly explains why not every application to join is successful. As an example, the OECD Council commenced membership talks with Chile, Estonia, Israel, Russia and Slovenia in 2007. These concluded in 2010 and resulted in the acceptance of all countries bar Russia. The OECD Council claimed that it 'has postponed activities related to the accession process of the Russian Federation to the OECD for the time being'.[16] This decision was a result of the Crimean crisis and Russia's invasion of eastern Ukraine. On 25 February 2022, the OECD Council condemned Russia's large-scale aggression against Ukraine and decided to formally terminate the accession process with Russia.[17] Furthermore, on 8 March 2022, the OECD Council decided to immediately suspend the participation of Russia and Belarus in OECD bodies, including the Competition Committee.[18]

14 BRICS is an acronym for Brazil, Russia, India, China, and South Africa.
15 OECD, Members and Partners, http://www.oecd.org/about/membersandpartners/ (accessed 24 July 2021).
16 Statement by the OECD regarding the status of the accession process with Russia & co-operation with Ukraine, http://www.oecd.org/newsroom/statement-by-the-oecd-regarding-the-status-of-the-accession-process-with-russia-and-co-operation-with-ukraine.htm (accessed 24 July 2021).
17 Statement from OECD Secretary-General on initial measures taken in response to Russia's large-scale aggression against Ukraine, https://www.oecd.org/newsroom/statement-from-oecd-secretary-general-on-initial-measures-taken-in-response-to-russia-s-large-scale-aggression-against-ukraine.htm (accessed 24 March 2022).
18 Statement from OECD Secretary-General on further measures in response to Russia's large-scale aggression against Ukraine, https://www.oecd.org/newsroom/statement-from-the-oecd-council-on-further-measures-in-response-to-russia-s-large-scale-aggression-against-ukraine.htm (accessed 24 March 2022).

3.1.5 Internal organisation

The OECD Convention established the Council as the organisation's governing body. It comprises senior ambassadors (ministers or permanent representatives to the OECD) from each member state. The Council manages the OECD and is authorised to issue decisions and adopt recommendations. It also plays a key role in the organisation's external relations. The OECD's basic tasks are carried out by specialist committees composed of representatives of member states with representatives of third-party countries as observers. These committees can set up working groups or appoint groups to address selected issues on an *ad hoc* basis. The committees are not permanent, but are only established for a specified time. A committee or working group can be renewed once its mandate has expired. Significantly, the OECD Council has free rein to change committee names or competencies, and can wind them up at any time. The committees are assisted by the OECD Secretariat and directorates. The directorates play a crucial role in collecting data, formulating proposals and organising committee sessions. They also provide analytical support for the issues discussed in committee meetings. The committees, in turn, set meeting agendas and delegate tasks and assign functions to the directorates. The OECD has adopted a decentralised system under which basic assignments are delegated to specialised directorates. These are granted a great deal of autonomy in determining output(s) and selecting procedures, techniques and so on, with the result that the administrative legal system instituted at the OECD level actually comprises many and varied systems of administrative law.[19]

The OECD budget is drawn up by its member states. It came to approximately €386 million in 2019.[20] Member contributions are calculated using an algorithm based on the size of their national economies. The United States, Germany and Japan consequently contribute the most. Each member state may additionally make voluntary contributions, which can be allocated to particular functions or activities. The OECD secretariat has a staff of 3,300 and the organisation's prestige is such that they are highly qualified. OECD studies, reports and other official documents are therefore usually of a very high standard. An eminently qualified Secretariat enables the OECD to function as an international think tank where countries can exchange and discuss information and work out common positions. Having such a highly qualified staff is crucial for collecting and accurately analysing relevant data, and for preparing discussions among member states.[21]

The institutionalised representation of business and labour organisations is a salient feature of the OECD. The Business and Industry Advisory Committee

19 J. Salzman, 'Decentralized Administrative Law in the Organization for Economic Cooperation and Development', *LCP*, vol. 68, iss. 3–4, 2005, p. 190.

20 OECD, Member Countries' Budget Contributions for 2019, https://www.oecd.org/about/budget/member-countries-budget-contributions.htm, (accessed 3 May 2020).

21 D.J. Gerber, *Global Competition. Law, Markets and Globalization*, Oxford, OUP, 2010, p. 112.

(BIAC) is the official business representative in OECD forums;[22] while the Trade Union Advisory Committee (TUAC) represents occupational groups and is represented on many OECD committees.[23] The involvement of the BIAC and the TUAC in OECD activities is meant to ensure that the concerns of interest groups are heard and to remedy the unrepresentativeness that stems from the organisation's restricted membership circle.

3.1.6 Internal organisational units for cooperation in competition protection

Although the OECD is predominantly managed by the Council, the tasks of devising best practices, compiling reports and conducting analyses are entrusted to specialist committees. The Competition Committee, with the support of the Directorate for Financial and Enterprise Affairs, is responsible for competition law and policy. The Competition Committee was formed on 5 December 1961, which makes it one of the oldest.[24] It replaced a previous committee charged with competition policy, which had been formed under the OEEC in 1953. The Committee consists of representatives from each member state (which are represented by NCAs during sessions); and another 13 observer states participate in discussions.[25] During Competition Committee conferences, NCAs exchange experience, work on solutions to common problems and have their work appraised through an informal evaluation system.[26] According to the OECD Council, the primary objective of the Competition Committee is to protect and promote competition as the organising principle of a modern economy, in consonance with the assumption that well-developed competition drives economic growth and employment, and makes the economy more flexible and innovative.[27] The Competition Committee has various means to achieve this objective at its disposal. These include assessing competition law and policy in individual countries and international organisations; analysing the competition law and policy of a given country within the context of other government policies; and making the

22 See The Business and Industry Advisory Committee to the OECD, http://biac.org/ (accessed 24 July 2021).

23 TUAC, The Trade Union Advisory Committee to the OECD, http://www.tuac.org/en/public/tuac/index.phtml (accessed 3 May 2021).

24 The Committee was established pursuant to Council Resolution OECD/C(61)47 (Final) and was initially named the Committee of Experts of Restrictive Business Practices. It was renamed the Competition Law and Policy Committee in 1987 – see Council Resolution C(87)138(Final) on the Committee of Experts on Restrictive Business Practices. The Committee's name was changed to the Competition Committee in 2001 – see Council Resolutions C/M(2001)23, pos. 402 and C(2001)261, adopted during the 1017th Council Session.

25 Brazil, India, Lithuania, Indonesia, Malta, South Africa, Peru, Bulgaria, Romania, Taiwan, Ukraine, Russia, Egypt.

26 T. Winslow, 'OECD Competition Law Recommendations, Developing Countries, and Possible WTO Competition Rules', *OECD Journal of Competition Law and Policy*, vol. 3, iss. 1, 2001, p. 117.

27 Council resolution on the Competition Committee, C(2008)134 & CORR1 and C/M (2008)17, item 219.

implementation of competition law more effective by devising best practices and encouraging and helping NCAs to work together. The Committee should additionally work with other organisations involved in protecting competition, especially the ICN.[28] The Competition Committee is defined as the basic mechanism for OECD members and observers to exchange views on competition policy issues, share experience, define best practices, periodically analyse national legislation and make recommendations.[29] The Competition Committee may not issue binding decisions, which are reserved for the OECD Council.[30] The Committee has essentially created a TCN.[31]

Two working groups currently operate under the auspices of the Competition Committee:

- Working Group 2 (formed on 1 October 1994) is dedicated to competition and regulation. It is involved in strengthening the effectiveness of economic reforms intended to promote competition by analysing issues in particular national legislatures and economic sectors, and by suggesting possible responses to identified problems through the development of best practices.[32] In practice, the group is mostly concerned with questions of substantive law as well as foreign competition policy and other public policies.
- Working Group 3 (formed in October 1964) is responsible for strengthening the effectiveness of competition regulations introduced under public law by developing best practices and encouraging NCAs to work together.[33] In practice, this group is mostly concerned with the institutional aspects of competition law, as well as issues associated with the development of procedural rules.

The Competition Committee has also undertaken several initiatives to increase its influence on the development of competition policy in non-member states. To this end, the Global Competition Forum was established on 1 January 2001. This initiative is open to any country, and primarily consists in holding annual conferences that bring together heads and senior officials of NCAs from over 100 countries. The main purposes of the Forum are to disseminate the OECD's knowledge of, and experience with, competition policy; and to exchange experience and expand the network of NCA heads acquainted with the OECD's work.[34]

28 *Directory of Bodies of the OECD*, Paris, OECD, 2012, p. 237–239, https://www.oecd-ilibrary.org/docserver/bodies_oecd-2012-en.pdf?expires=1533744629&id=id&accname=guest&checksum=FCA4F005F8C53BEA21D0D0688FABC00B (accessed 24 July 2021).
29 F. Jenny, 'International Cooperation on Competition. Myth, Reality and Perspective', *Antitrust Bulletin*, vol. 48, iss. 4, 2003, p. 981.
30 Please note that this instrument has not been used in decades.
31 D. Sokol, 'Monopolists without Borders. The Institutional Challenge of International Antitrust in a Global Gilded Age', *Berkeley Business Law Journal*, vol. 4, iss. 1, 2007, p. 97.
32 *Directory of Bodies of the OECD*, p. 242.
33 Ibid, p. 243.
34 OECD, Global Forum on Competition, http://www.oecd.org/competition/globalforum/abouttheglobalforumoncompetition.htm (accessed 24 July 2021).

Apart from the Global Competition Forum, the OECD was involved in the formation of two regional competition centres and one regional competition forum:

- The OECD GVH Regional Centre is a joint initiative of the OECD and the Hungarian Competition Authority (GVH). It opened in February 2005 and its role has expanded the influence of the OECD in Central and Eastern Europe, as well as the Asiatic part of the former Soviet Union.[35]
- The OECD Korea Policy Centre is a joint initiative of the OECD and the Republic of Korea. It opened in May 2004 and its mission is to encourage NCAs in the Asia-Pacific region to further their cooperation in developing competition law and policy. The Centre is a place where officials from regional NCAs can meet and exchange experience by holding conferences, seminars, workshops and other events.[36]
- The Latin American and Caribbean Competition Forum was launched by the OECD and the Inter-American Development Bank in April 2003. This joint initiative aims to improve the effectiveness of competition legislation in Latin America and the Caribbean. The Forum is an important regional institution, especially as the degree of legislative development in competition protection is not all that advanced.[37] Participants are senior officials of Latin American NCAs and the emphasis is on sharing experience in a collegial setting.[38]

3.1.7 Forms of activity

The legal alternatives available to the OECD are set out in Article 5 of the Convention, pursuant to which the OECD can make decisions that, in the absence of any contrary regulations, are binding on all members; make recommendations to members; and enter into agreements with members, non-member states and international organisations. Binding decisions are the least common option, as the OECD achieves its ends using soft law. The number of binding decisions was noticeable until the mid-1970s, but non-binding recommendations and other soft law instruments have dominated since. Article 5(b) of the Convention clearly states that the organisation can achieve its aims through recommendations to members. The recommendations and general activities of the OECD stand out from those of other forms of international cooperation by their linking

35 OECD, OECD-GVH Regional Centre for Competition in Budapest, http://www.oecd.org/daf/competition/oecd-gvhregionalcentreforcompetitioninbudapest.htm (accessed 24 July 2021).

36 OECD, OECD/Korea Policy Centre, Competition Programme, http://www.oecd.org/daf/competition/oecdkoreapolicycentrecompetitionprogramme.htm (accessed 24 July 2021).

37 OECD, About the Latin American and Caribbean Competition Forum, http://www.oecd.org/competition/latinamerica/aboutthelatinamericancompetitionforum.htm (accessed 24 July 2021).

38 I. De Leon, *An Institutional Assessment of Antitrust Policy. The Latin American Experience*, The Hague, WK, 2009, p. 89.

competition policy issues to economic growth.[39] This is manifested through a broader and deeper look at the issues being analysed. The OECD recommendations are non-binding in two ways. First, as the name makes clear, they are only recommendations. Second, they each state that any country may refuse to comply to the extent that doing so would be contrary to its interests.[40] In the opinion of one of the OECD's most prominent representatives, the organisation hands down approximately 30 decisions and concludes several international agreements every year, although most of the legal instruments it applies are soft law and non-binding. However, despite the OECD recommendations being soft law, member states invariably express strong political support for their adoption; and despite their non-binding nature, they impact on national legislation and administrative practices.[41] It is therefore unsurprising that the OECD has been described as a 'market leader in developing standards and guidelines'.[42] This justifies the OECD being described as an organisation that plays a key role in the battle of ideas by accumulating, compiling and disseminating knowledge and information.[43] Last but not least, regular activities of the OECD's Competition Committee and working groups centre around conducting peer reviews and organising roundtables.[44]

3.1.8 Network output

Any reference to the OECD output must include its form of activity and organisational capabilities. The descriptions of the OECD as a 'soft law organisation' and an 'intergovernmental think tank' immediately highlight its two most visible spheres of activity. As mentioned above, the OECD has never managed to have a binding international agreement on competition protection adopted, although it has 'compensated' for this by formulating recommendations and producing reports.

The OECD has had dozens of recommendations on competition policy[45] and best practices adopted. Sixteen have been accepted as binding (see Table 3.1).[46]

39 B. Michalski, *Międzynarodowa koordynacja polityki konkurencji*, Warsaw, Difin, 2009, p. 119–120.
40 T. Winslow, 'OECD competition Law Recommendations', p. 118.
41 N. Bonnuci, 'The OECD at Fifty. Some Observations on the Evolving Nature of an International Organization', *The George Washington. International Law Review*, vol. 43, iss. 2, 2011, p. 247.
42 OECD, Focus on Africa – OECD, http://www.oecd.org/ctp/40998413.pdf (accessed 24 July 2021).
43 M. Marcussen, 'OECD Governance through Soft Law', p. 112.
44 P. Carroll, A. Kellow, *The OECD. A Study of Organisational Adaptation*, Cheltenham, Edward Elgar Publishing, 2005, p. 31 ff.
45 Not all of these recommendations comprised completely new acts; many simply amended, supplemented or superseded previous acts.
46 Recommendations and Best Practices on Competition Law and Policy, https://www.oecd.org/daf/competition/recommendations.htm (accessed 24 July 2021).

Table 3.1 OECD recommendations and best practices on competition policy.

1978 – Recommendation on Action against Restrictive Business Practices relating to the Use of Trademarks and Trademark Licences
1979 – Recommendation on Competition Policy and Exempted or Regulated Sectors
1986 – Recommendation on Co-operation between Member Countries in Areas of Potential Conflict between Competition and Trade Policies
1989 – Recommendation on the Application of Competition Laws and Policy to Patent and Know-How Licensing Agreements
1998 – Recommendation concerning Effective Action Against Hard Core Cartels
2001 – Recommendation concerning Structural Separation in Regulated Industries (updated in 2016)
2005 – Recommendation on Merger Review
2005 – Best Practices on Information Exchange
2005 – Guiding Principles for Regulatory Quality and Performance[47]
2009 – Recommendation on Competition Assessment + Competition Assessment Toolkit[48]
2012 – Recommendation on Fighting Bid Rigging in Public Procurement + Guidelines for Fighting Bid Rigging in Public Procurement[49]
2014 – Recommendation concerning International Co-operation on Competition Investigations and Proceedings
2019 – Recommendation concerning Effective Action against Hard Core Cartels
2019 – Recommendation on Competition Assessment
2021 – Recommendation on Competitive Neutrality
2021 – Recommendation on Transparency and Procedural Fairness in Competition Law Enforcement.

The two not enumerated in Table 3.1 are only of historical interest.[50] The OECD Competition Committee has been very active in updating old recommendations and adopting new documents. The guidelines in these documents set a certain standard for OECD member states. These guidelines, however, cannot be

47 See further the two background papers 'Recommendation on Improving the Quality of Government Regulation', 9 March 1995, http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=OCDE/GD(95)95 (accessed 24 July 2021) and 'Report on Regulatory Reform: Synthesis', Paris 1997, https://www.oecd.org/gov/regulatory-policy/2391768.pdf (accessed 24 July 2021).

48 OECD, Competition Assessment Toolkit, http://www.oecd.org/daf/competition/assessment-toolkit.htm (accessed 24 July 2021).

49 The guidelines are much more detailed than the recommendation and are available in 24 languages – OECD, Guidelines for Fighting Bid Rigging in Public Procurement, http://www.oecd.org/daf/competition/guidelinesforfightingbidriggininpublicprocurement.htm (accessed 24 July 2021).

50 These are the 1971 Recommendation of the Council concerning Action against Inflation in the Field of Competitive Policy; and the 1978 Recommendation of the Council concerning Action against Restrictive Business Practices Affecting International Trade Including Those Involving Multinational Enterprises.

so detailed as to encroach on the exclusive competence of member states to create, modify and repeal their own regulations.

Reports and studies following Competition Committee meetings are the next major component of the OECD's output.[51] These summarise discussions on current issues in competition policy. Reports generally include a background notice prepared by the OECD; articles and presentations given by academics and practitioners invited to attend; national situations detailing the experiences of individual jurisdictions on particular issues; and summaries of discussions. They are characterised by a high level of analysis and are frequently the only means of becoming acquainted with national proposals and outcomes and the administrative practices of individual NCAs.

National assessment reports are a major component of the OECD's work. Periodically or at the request of an interested country, the OECD will have a peer review of a given jurisdiction conducted to assess the compliance of its national law and administrative practice with OECD recommendations and guidelines. These reports are prepared by independent experts commissioned by the OECD. Each country has a right to respond prior to publication. The conclusions of these reports have a great deal of legal and practical significance for some countries; while their persuasive impact is negligible for others (eg, Poland).[52] Moreover, every NCA in every OECD member state prepares an annual report of its activities (separate from national reports) for the OECD. Some countries (eg, Hungary) publish these reports on their websites; but many others (eg, Poland) do not. Fortunately, they are accessible on the OECD website or upon request.[53]

The OECD was heavily involved in lending technical assistance to the countries of Central and Eastern Europe during their political transformation. This assistance was especially noticeable in Poland in the early 1990s. The organisation is now concentrating its efforts on assisting the former Soviet Union, as well as Asia and South America.

3.1.9 Form and scope of cooperation

The OECD is predominantly an informational and harmonisation network. As such, its main focus is on meetings and discussions to exchange information and possibly produce jointly drafted documents. NCAs participate in the twice-yearly meetings of the Competition Committee and its working groups by drafting their viewpoints for particular meetings and taking part in discussions. The OECD Secretariat arranges these meetings and documents their outcomes.

NCAs are involved in the work of regional OECD centres, in addition to attending meetings at the OECD headquarters in Paris. This predominantly consists in holding conferences and seminars, and offering technical assistance to non-OECD countries. Regional centres play a special role in publicising the

51 OECD, Best Practice Roundtables on Competition Policy, https://www.oecd.org/daf/competition/roundtables.htm (accessed 24 July 2021).

52 See further M. Błachucki, 'The Role of the OECD', pp. 189–191.

53 Annual Reports by Competition Agencies on Recent Developments, https://www.oecd.org/daf/competition/annualreportsbycompetitionagencies.htm (accessed 24 July 2021).

achievements of the organisation and increasing its influence on non-member states. The regional centre for Europe is in Budapest, and its activity is directed towards assisting the former Soviet Union.[54] Poland's Office of Competition and Consumer Protection has almost no involvement in the centre's work.

Holding discussions and exchanging information can result in the adoption of various different kinds of documents. As mentioned, as far as legally binding instruments on competition policy are concerned, the OECD only makes use of recommendations. No international agreement has ever been concluded, and the OECD has issued no binding policy decisions since the 1970s. The shift from hard legal instruments to soft instruments in the form of recommendations seems to have been a conscious political choice on the part of the OECD, as the work of the Competition Committee would otherwise have been paralysed.

The jurisdictional basis for working together mostly stems from a 2014 recommendation on international cooperation in competition proceedings and investigations. In practice, this boils down to informing other member states when gathering evidence from another country. This generally involves sending questionnaires to businesses whose head offices are situated in another country and informing that country's NCA of having done so.

3.1.10 Network characteristics: summary

The network of NCAs that functions in the OECD is a formalised, closed, horizontal network. It is predominantly an informational and harmonisation network, with a limited administrative component whose role is diminishing. The network has a substantially global dimension, but its reach is restricted to the world's most developed countries. There are noticeable attempts to influence non-OECD countries, but their role is limited on account of the existence of the ICN.

The importance of the OECD for the development of competition law and international cooperation in this area must be examined in historical terms. During the 1970s and 1980s, the OECD played a pivotal role as one of the most important forums for cooperation in this area.[55] For many reasons, its role has weakened over time, but the organisation is still trying to find a place for itself among the world's TCNs. The OECD seems to be focused on those activities that distinguish it from other networks. It undoubtedly has the best expert facilities, and the discussions that take place in the course of the Competition Committee and its working groups are characterised by their quality and organisation. OECD documents are noteworthy for their quality and comprehensive analysis, thanks to the

54 OECD-GVH Regional Centre for Competition in Budapest, http://www.oecd.org/daf/competition/oecd-gvhregionalcentreforcompetitioninbudapest.htm (accessed 24 July 2021).

55 For more information on the achievements and evolution of the role of the OECD, see M. Błachucki, 'The Role of the OECD', pp. 169–200.

organisation's permanent and relatively large administrative framework. Moreover, the organisation is an excellent reviewer of national public policies and the activities of the administrative bodies charged with their execution. Although the organisation's highly liberal viewpoint need not be accepted *in toto* by everyone, the findings that come out of OECD reports can often serve as a basis for legislative and organisational changes. In 2017, an attempt was made to enhance cooperation by opening a discussion on a recommendation to strengthen cooperation between NCAs.[56] While this recommendation seems to have little chance of being adopted at present, it attests to the vigour and resilience of the network, and signals an attempt to guide the development of international cooperation between NCAs.

3.2 United Nations Conference on Trade and Development

3.2.1 Origin and history

The United Nations Conference on Trade and Development (UNCTAD) was established in Geneva in 1964. It was created as an intergovernmental forum to promote North-South dialogue, and to facilitate negotiations on issues within the sphere of interest of developing countries and provide research facilities and policy advice on problems related to development. Developing countries had felt the need for an institutional platform that gave them a voice in international relations since the early 1960s. UNCTAD was meant to be convened every four years, and an international body and permanent Secretariat were to operate in the interim. UNCTAD was especially active in the 1970s, when it attempted to become the leading forum for the resolution of global economic issues. UNCTAD was perceived as a rival to the OECD in the development of competition law and policy, and the efforts it made to establish an international legal framework to combat anti-competitive business practices were construed as being predominantly directed towards protecting the interests of developing countries.[57] These countries began to gravitate towards more liberal economic policies in the 1980s, as the economic crisis worsened. UNCTAD continually strives to serve as the voice of the poorest countries of the South and, to a certain extent, to constitute a counterbalance to the barriers erected by the WTO with undue haste, and for which many developing countries are not yet prepared.[58]

3.2.2 Legal basis

The legal basis for UNCTAD's activities is a 1964 United Nations General Assembly (UNGA) decision to set up the Conference as a permanent intergovernmental body under the auspices of the UNGA. UNCTAD is a subsidiary organ of the UN.

56 An analysis of the form and scope of this enhanced cooperation, together with an assessment of the practicability of adopting legal instruments in this area, is presented in Chapter 8.

57 P.J. Lloyd, K.M. Vautier, *Promoting Competition in Global Markets. A Multi-National Approach*, Cheltenham, Edward Elgar Publishing, 1999, p. 127.

58 UNCTAD, History, https://unctad.org/about/history (accessed 24 July 2021).

3.2.3 Network aims

UNCTAD is an international forum under the umbrella of the UN. Since 2010, UNCTAD has enjoyed an unequivocal mandate to develop international cooperation in fighting cross-border anti-competitive practices.[59] Its fundamental objectives are to:

- promote international trade in order to accelerate economic development;
- formulate principles and policies on international trade and economic development, and make recommendations for their implementation;
- examine and facilitate the coordination of activities related to trade and economic development between UN organs and institutions;
- initiate multilateral international trade treaties and conventions; and
- be a centre for the harmonisation of trade and development policies.[60]

Competition law and policy is only one of many topics of interest to UNCTAD. The body's overriding objective is to assist developing countries, and the promotion of competition law and policy must be part of achieving this.

3.2.4 Membership

UNCTAD's membership comprises 194 UN member states. Membership is open to all UN countries willing to be involved in its activities. UNCTAD provides the framework for the world's largest TCN. All UN members participate in UNCTAD, which is not the case even for the ICN.[61]

3.2.5 Internal organisation

UNCTAD's main decision-making organ is a quadrennial Conference, at which all issues within its mandate are discussed and its priorities are set. The UNCTAD Trade and Development Board manages UNCTAD's work when the Conference is not in session. The Board meets in Geneva every year for a regular session and up to three regulatory sessions to discuss pressing managerial and institutional issues. UNCTAD is supported by a permanent Secretariat comprising some 400 officials. The UN grants it an annual budget of approximately $68 million and an extra-budgetary $40 million for its technical assistance fund.[62]

59 P.M. Horna, 'How ICN and UNCTAD Can Work Together in International Cartel Enforcement Beyond 2020. Experiences of the UNCTAD Discussion Group on International Cooperation', in P. Lugard, D. Anderson (eds), *The ICN at Twenty. Accomplishments and Aspirations*, Brussels/New York, Intersentia, Concurrences, 2022, p. 320.

60 UNCTAD, About, https://unctad.org/about (accessed 24 July 2021).

61 P.M. Horna, 'How ICN and UNCTAD Can Work Together', p. 331.

62 UNCTAD's Programme Budget and Financing of Technical Cooperation Activities, https://unctad.org/page/unctads-programme-budget-and-financing-technical-cooperation-activities (accessed 24 July 2021).

The Secretariat supports UNCTAD's content management units – especially the Trade and Development Commission, the Investment Commission, the Enterprise and Development Commission and the Science and Technology for Development Commission (a subsidiary body of the UN Socio-Economic Council). These commissions convene to discuss issues in particular regions and set guidelines for the Secretariat. The Secretariat additionally conducts analyses through five divisions: Africa, Least Developed Countries and Special Programs; Globalization and Development Strategies; Investment and Enterprise; International Trade and Commodities; and Technology and Logistics.[63]

3.2.6 Internal organisational units for cooperation in competition protection

The internal structure of UNCTAD's units responsible for competition policy issues is a natural consequence of the Conference being a UN deliberative body. As UNCTAD is primarily a discussion venue, it sees the Intergovernmental Group of Experts on Competition Law and Policy (IGE) as crucial to competition policy from a developmental perspective. This group was formed in 2000 and consists of representatives of particular NCAs. Academics and practitioners are invited to participate in its work. The IGE meets once a year and its work covers the following issues:

- the links between competition policy and development;
- the effectiveness of NCAs;
- international cooperation;
- relations between competition policy and consumers; and
- capacity building.[64]

These meetings result in reports, tools and guidelines for UNCTAD members. Their major achievement is the production of a model law on competition[65] and a competition law handbook.[66]

The IGE is not vested with any administrative or legislative authority. It is a conventionally deliberative body and, as such, it operates through:

63 UNCTAD, Organization, https://unctad.org/about/organization (accessed 24 July 2021).
64 UNCTAD, Mandate and Key Functions, https://unctad.org/Topic/Competition-and-Consumer-Protection (accessed 24 July 2021).
65 UNCTAD, The Model Law on Competition, https://unctad.org/webflyer/model-law-competition (accessed 24 July 2021).
66 UNCTAD, *Handbook on Competition Legislation. Consolidated Report 2001–2009*, New York/Geneva, 2009, http://unctad.org/en/PublicationsLibrary/ditcclp2009d2_en.pdf (accessed 24 July 2021); UNCTAD, *Handbook on competition Legislation*. Vol. II. Consolidated report 2013–2014, Geneva, 2014, http://unctad.org/en/PublicationsLibrary/ditcclp2012_handbook_en.pdf (accessed 24 July 2021).

- holding debates;
- voluntarily arranging for peer reviews of national systems of competition law and policy;
- holding roundtable discussions on specialist competition policy topics; and
- assessing technical assistance and efforts to build the organisational potential of NCAs.[67]

The IGE can also adopt guidelines, albeit non-binding; and every UNCTAD member state can decide whether and by what means it will incorporate them.

The IGE is the only dedicated unit in UNCTAD or its Secretariat. However, UNCTAD additionally holds the quinquennial United Nations Conference for the Review of the Set of Mutually Agreed Equitable Principles for the Control of Restrictive Business Practices. This was adopted by UNCTAD in 1980.[68] These Review Conferences are open to NCA heads and senior officials for the purpose of exchanging experience and best practices and establishing contact networks between representatives from developing and least developed countries. They also provide an opportunity to assess UNCTAD's technical assistance and efforts to enhance the organisational potential of NCAs.

3.2.7 Forms of activity

UNCTAD is a deliberative organisation. It has no means of adopting binding legal instruments. The Conference itself defines its mission in three words: think, debate, deliver.[69] UNCTAD is a place for the sort of dialogue and reflection that helps hammer out the analyses that underpin recommendations for governments. These analyses present economic issues in the context of reducing social and economic inequality in the world and placing social needs at the centre of economic policy. To this end, UNCTAD – through the IGE and the Review Conferences – provides a forum for any country that wishes to combat these inequalities.

One of the more interesting initiatives adopted at the UNCTAD forum was an international cooperation legal toolkit to counteract anti-competitive practices on the part of transnational corporations and transborder violations of competition law. The proposal was put forward by Russia.[70] The toolkit is meant to be an extension of the guidelines adopted by UNCTAD. At the normative level, however, it does not provide any new legal instruments, but rather codifies existing

67 UNCTAD, Intergovernmental Group of Experts on Competition Law and Policy, https://unctad.org/topic/competition-and-consumer-protection/intergovernmental-group-of-experts-on-competition-law-and-policy (accessed 24 July 2021).

68 For more information, see Section 3.2.8.

69 UNCTAD, UNCTAD at a Glance, http://vi.unctad.org/tap/docs/unctad_glance.pdf (accessed 24 July 2021).

70 Federal Antimonopoly Service, Toolkit on International Cooperation of Competition Authorities on Combating Restrictive Business Practices of Transnational Corporations and Transborder Violations of Rules on Competition, http://en.fas.gov.ru/press-center/news/detail.html?id=49965 (accessed 24 July 2021).

forms of cooperation. That said, this initiative should not be underestimated, as TCNs have not particularly concerned themselves with anti-competitive practices on the part of transnational corporations over the past decade.

UNCTAD is also involved in researching the different aspects and perspectives of competition policy issues through, for example, the Research Partnership Platform. This programme was set up for the purposes of conducting common research activities and collecting and analysing data. Research is conducted on four of the five issues within the IGE's sphere of interest as outlined above (ie, excluding technical assistance), resulting in reports and studies utilised by the IGE.

Discretionary competition law and policy reviews commissioned by member states link UNCTAD's research activities to its discussion forum. A discretionary review is conducted by independent experts at the request of the interested country. The conclusions are discussed in three IGE sessions. These provide an opportunity to have any doubts clarified and allow the experts and the interested country to share experience. Recommendations are formulated on the basis of the conclusions of the review and UNCTAD provides technical support during their implementation.

Providing technical assistance to, and building the potential of, NCAs is an essential part of UNCTAD's activity, and is largely connected with the voluntary reviews of competition law and policy measures. Technical assistance is offered as part of UNCTAD's programmes. Historically, the two most important programmes are COMPAL, addressed to Latin America; and AFRICOMP, addressed to Africa. The Working Group of Trade and Competition Policies (WGTCP), which lends technical assistance to Latin America and the Caribbean, is also worth mentioning.[71] The ongoing COMPAL Global programme provides assistance across several continents, with no particular preference. The programme simultaneously promotes regional cooperation between NCAs. UNCTAD also encourages NCAs in developed countries to commit themselves to assisting their counterparts in developing countries. Having UNCTAD experts in many countries ensures that the Conference fieldwork is intensive and maintains the flow of information about the situations in those countries that receive technical assistance. Providing advanced technical assistance and being open to assisting regional networks in building cooperation between NCAs in smaller jurisdictions have made UNCTAD a fairly influential network with regard to developing jurisdictions.[72]

3.2.8 Network output

In addition to research work and technical assistance, UNCTAD has adopted extensive initiatives to develop international competition law regulations. The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of

71 See further P.M. Horna, 'The Working Group on Trade and Competition Policies (WGTC) in Latin America and the Caribbean: Fostering Cooperation and Regional Integration of Markets', in V. Marques de Carvalho, C.E. Joppert Ragazzo, P. Burnier da Silva (eds), *International Cooperation and Competition Enforcement. Brazilian and European Experiences from the Enforcers' Perspective*, The Hague, WK, 2014, pp. 91 ff.

72 I. Maher, A. Papadopoulos, 'Competition Agency Networks Around the World', in A. Ezrachi (ed), *Research Handbook on International Competition Law*, p. 72.

Restrictive Business Practices was adopted in the UNCTAD forum.[73] The Set is merely a non-binding recommendation, and not an international legal instrument. Neither the Set nor its interpretation constitutes a basis for adopting uniform international competition law regulations. If anything, it has caused a rift between developed and developing countries. Nevertheless, the view that the Set has inspired a spontaneous (through conventional international law) or organised (through the conclusion of an international competition agreement) global competition regime can be seen in the literature on the subject.[74] However, those opinions indicating the more limited practical utility of the Set, both for the international community and for individual countries, seem to hold greater validity.[75] The adoption of the Set was a test for taking the initiative in concluding an international competition agreement as a counterbalance to the initiative taken in the OECD forum. The Set, then, was embedded in a specific political context from the outset. Expansion of the Set has been devised using the UNCTAD model competition law, which may serve as a starting point for any country wanting to pass its own competition statute.

3.2.9 Form and scope of cooperation

UNCTAD is predominantly an informational network that brings about various forms of cooperation between NCAs. It provides a forum through which NCAs can hold discussions and exchange experience. UNCTAD can additionally assist in establishing NCAs and improving their operations; and in creating and fine-tuning national competition law. It does not, however, provide for administrative cooperation in examining pending issues.

3.2.10 Network characteristics: summary

UNCTAD's network of NCAs is a formalised, open, horizontal network that operates within its structures. It is first and foremost an informational network, and its harmonisation component is very limited. Essentially, it has a global dimension, but it is mostly focused on developing countries. There have been no successful attempts to create an international competition network in the UNCTAD forum, and its importance to the development of competition law and cooperation between NCAs is negligible.

73 The United Nations Set of Principles and Rules on Competition. The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, Geneva 2000, http://unctad.org/en/docs/tdrbpconf10r2.en.pdf (accessed 24 July 2021).

74 I. Lianos, 'The Contribution of the United Nations to the Emergence of Global Antitrust Law', *Tulane Journal of International & Comparative Law*, vol. 15, iss. 2, 2007, p. 48.

75 O. Budzinski, *The Governance of Global Competition. Competence Allocation in International Competition Policy*, Cheltenham, Edward Elgar Publishing, 2008, p. 142; A.S. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, CUP, 2010, p. 208.

As UNCTAD is an institutionalised voice for developing countries, its activities have a fairly clearly defined political dimension. This does little to foster cooperation between independent NCAs to avoid direct involvement in political issues. The real value of UNCTAD, however, lies in its placing competition policy within the social, political and geographical context of developing countries. The organisation suggests ways of adapting competition law to the needs of developing countries so as to serve their best interests and not those of global corporations. UNCTAD has developed a receptive climate for, and a better understanding of, competition laws across a wide range of nations. Its broad and inclusive membership makes it a unique platform, differentiating it from both the OECD and the ICN.[76]

3.3 World Trade Organization

3.3.1 Origin and history

The WTO is an international organisation established to liberalise international trade in goods and services; conduct an investment policy that supports trade; resolve trade disputes; and observe intellectual property laws. The WTO was formed on 1 January 1995 and is headquartered in Geneva.

3.3.2 Legal basis

The WTO was established in 1994 pursuant to the Marrakesh Agreement, which came out of the Uruguay General Agreement on Tariffs and Trade (GATT) round.[77] It is worth noting that the original GATT text was modelled on a chapter of the Havana Charter, which anticipated the WTO. Significantly, the Havana Charter contained regulations to counteract international anti-competitive business conduct, and the original GATT text contained a note suggesting that it be ratified in its entirety.[78] The Marrakesh Agreement did not give the WTO a mandate to protect competition.[79] The WTO was accordingly formed as an international organisation with a global reach and the aim of promoting free trade.

3.3.3 Network aims

The main aim of the organisation is to ensure free, fair and unrestricted international trade, predicated on WTO members being equal and genuinely prepared to

76 M. Martyniszyn, 'The Role of UNCTAD in Competition Law and Policy', in T. Cottier, K. Nadakavukaren Schefer (eds), *Elgar Encyclopedia of International Economic Law*, Cheltenham, Edward Elgar Publishing, 2017, p. 490.
77 General Agreement on Tariffs and Trade.
78 P.J. Lloyd, K.M. Vautier, *Promoting Competition*, pp. 125–127.
79 The Marrakesh Agreement, which established the WTO on 15 April 1994, https://www.wto.org/english/docs_e/legal_e/marrakesh_decl_e.htm (accessed 24 July 2021).

work together to resolve common disputes arising from the application of WTO regulations. The organisation is a forum for member states to negotiate and adopt international trade agreements (eg, GATT).

3.3.4 Membership

The WTO has 164 members,[80] which account for approximately 96% of world trade turnover, with a further 25 countries at the negotiations stage.

3.3.5 Internal organisation

The highest decision-making body of the WTO is the Ministerial Conference, which is usually held every two years. Decisions are adopted by unanimous consensus. The organisation is run by the General Council between Ministerial Conferences. The Council normally consists of ambassadors and heads of delegations in Geneva and sometimes civil servants sent from the capitals of member states. It also meets as the Trade Policy Review Body and the Dispute Settlement Body.

There are three Councils in addition to the General Council: the Council for the Trade in Goods; the Council for the Trade in Services; and the Council for Trade-Related Aspects of Intellectual Property Rights. In addition, there are specialist ancillary bodies (eg, councils, committees, subcommittees) that include all member states, and that administer and oversee the WTO agreements they implement.

Ongoing projects are managed by the director general, assisted by the Secretariat. The WTO Secretariat employs approximately 630 administrative staff and has an annual budget of approximately CHF 200 million.[81]

3.3.6 Internal organisational units for cooperation in competition protection

Despite there being no original mandate to adopt regulations to protect competition in international trade, the WTO has taken action to counteract anti-competitive business practices and has combined this issue with trade policy. The European Union was a strong advocate of putting competition policy on the WTO agenda.[82] A special Working Group on the Interaction between Trade and Competition Policy (the Singapore Group) was established at a Ministerial Conference in Singapore in 1996 for the purpose of involving all WTO member states in examining various aspects of the relationship between trade and competition policy. To this end, it managed an internal unit devoted to competition policy

80 As at 24 July 2021.

81 WTO, Overview, https://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm (accessed 24 July 2021).

82 A. Mundt, 'Development of Multilateral Cooperation from a National Competition Authority's Point of View', in N. Charbit, S. Ahmad (eds), *Frédéric Jenny. Standing Up for Convergence and Relevance in Antitrust. Liber Amicorum,* Vol. I, New York, Concurrences, 2018, p. 9–10.

issues. Pursuant to a ministerial declaration passed in Doha in 2001, the Singapore Group concentrated its research on:

- fundamental principles, including transparency, non-discrimination and procedural fairness in competition law;
- regulations on the most serious cartels;
- means of achieving voluntary cooperation on competition law; and
- support for the gradual strengthening of entities responsible for competition policy in developing countries by building the capacity of their NCAs.

The next round of negotiations at the Ministerial Conference in Cancún in 2003 was meant to pave the way for an international WTO agreement on common rules on competition law. However, no agreement was reached; although ministers 'reaffirmed all their Doha Declarations and Decisions and recommitted themselves to working to implement them fully and faithfully'.[83]

On 1 August 2004, the WTO General Council resolved that competition policy 'will not form part of the Work Programme set out in that Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round'.[84] This effectively rendered the Singapore Group inactive. However, some experts from the WTO suggested that while currently designated as 'inactive', the Working Group on the Interaction between Trade and Competition Policy still exists.[85] According to them, this formulation leaves the door open to a resumption of work on these issues following the conclusion of the Doha Round. Arguably, it also does not rule out – even before that time – a resumption of exploratory work on these issues, provided that such work is not currently directed 'towards negotiations'. Certainly, the WTO Working Group – which in its early years earned solid credit for just such an exploratory work programme – would be a logical body to contribute to such an assessment.[86]

3.3.7 Forms of activity

The WTO is not generally active in competition law at present. The basic activity of WTO countries is to negotiate and sign accords, treaties etc. Unfortunately, this has not been achieved in the field of competition law. Some authors advocated for the adoption of an International Competition

83 WGTCP, History, Mandates and Decisions, https://www.wto.org/english/tratop_e/comp_e/history_e.htm#cancun (accessed 24 July 2021).
84 Ibid.
85 R.D. Anderson, A.C. Muller, 'Competition Law/Policy and the Multilateral Trading System: A Possible Agenda for the Future', *E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum*, 2015, p. 11, www.e15initiative.org/ (accessed 25 May 2022).
86 Ibid.

Policy Agreement within the WTO, even though from the outset this was seen as a complex and difficult process.[87]

3.3.8 Network output

The WTO established the Singapore Group shortly after its inception. The Group presented several reports and prepared a ministerial declaration recommending that competition law be included within the purview of the WTO. The point was made that the WTO, as an organization empowered to issue binding international decisions, employs highly trained specialists and represents a broad spectrum of interests; and as such, that it is better qualified than the OECD forum to adopt international competition law regulations.[88] Despite EU support, and in the face of strong US scepticism, the next round of WTO negotiations in Cancún in 2003 proved to be a fiasco and resulted in competition law being taken off the WTO agenda. The European Union was very closely involved in the negotiations, as it attached particular importance to the adoption of a multilateral competition agreement.[89] However, the European Union's overly ambitious objectives in the face of disapproval from many countries resulted in its failure to achieve any of them and in the negotiations ultimately coming to nothing.[90] Moreover, developing countries were among those that opposed the inclusion of competition policy among the issues to be negotiated at the WTO level.[91] Several factors for the WTO's failure to adopt global competition law regulations are cited in the literature.[92] First, the specific makeup of the WTO was a fundamental barrier to its being entrusted with competition protection matters. The WTO's centralised management apparatus works to restrict the sovereignty of its member states. Many countries were not prepared to cede their jurisdictional exclusivity over competition law. Second, the WTO's dispute resolution mechanism is not suited to resolving competition law issues. The parties and subject matter involved in this kind of dispute are generally private and do not fit within the mechanisms utilised by the WTO.[93] Moreover, the WTO is not capable of monitoring the behaviour of completely private entities. A lot of international cartels are not subject to any

87 S. Bilal, M. Olarreaga, 'Competition Policy and the WTO: Is There a Need for Multilateral Agreement?', *EIPA Working Paper 98/W/02*, pp. 18 ff.
88 A. Fiebig, 'A Role for the WTO in International Merger Control', *NJILB*, vol. 20, iss. 2, 2000, p. 247.
89 M. Martyniszyn, 'Extraterritoriality in EU Competition Law', in N. Cunha Rodrigues (ed), *Extraterritoriality of EU Economic Law*, Berlin, Springer-Verlag, 2021, pp. 51 ff.
90 For more on the negotiations and the reasons for the failure of the EU at the WTO forum, see L.M. Davison, D. Johnson, 'An Exploration of the Evolution of the EU's Twin-Track Approach to the Achievement of Its International Competition Policy Goals', *LLR*, vol. 36, iss. 1, 2015, pp. 74 ff.
91 C. Dube, 'The Role of Competition Reforms in Unlocking International Trade: Evidence from Africa's Proposed Tripartite Free Trade Area', *The Antitrust Bulletin*, vol. 66, iss. 2, 2021, p. 269.
92 M.H. Dabbah, *International and Comparative Competition Law*, Cambridge, CUP, 2010, p. 128.
93 Ibid, p. 129–130.

government restrictions, so the WTO mechanisms would only be effective in cases where national governments have contributed to the growth of cartels through their legal regulations or as a result of a failure to enact statutes to combat them.[94]

3.3.9 Form and scope of cooperation

The involvement of competition authorities in the network has been restricted to performing tasks as part of a working group. As mentioned above, the fact that this has not brought about a positive result is due to a political decision on the part of member states, and not the ineffectiveness of the working group. It is interesting that after the failure of the Doha Round, some authors believed that the working group may have become much more of a 'transparency body', as opposed to engaging in a pre-negotiation process of the type it had previously pursued.[95] However, those expectations were not met by the political will of the WTO members.

3.3.10 Network characteristics: summary

The network of NCAs that operates within the WTO is a formalised, open, horizontal network. It is predominantly an informational network. Its horizontal component is very limited and its role is constantly diminishing. The network has a generally global dimension but mainly interacts with developing countries. No attempt to create an international competition agreement in the WTO has been successful. The network therefore currently has virtually no significance for cooperation and the development of competition law. However, some hope that while the WTO Working Group is currently designated as inactive, it remains a potential resource and avenue for advancement if and when WTO members find the time for this has come.[96]

3.4 International Competition Network

3.4.1 Origins and history

The ICN is a virtual, transnational network of competition authorities. It was established in New York on 25 October 2001 by senior representatives of 14[97] NCAs.[98]

94 D. Sokol, *Monopolists without Borders*, p. 92.
95 B. Hoekman, K. Saggi 'International Cooperation on Domestic Policies: Lessons from the WTO Competition Policy Debate', *CEPR Discussion Paper,* no 4693, 2004, p. 23.
96 R.D. Anderson, W.E. Kovacic, A.C. Muller, A. Salgueiro, N. Sporysheva, 'Competition Policy and the Global Economy: Current Developments and Issues for Reflection', *GWLRev*, vol. 88, 2020, p. 1476.
97 Australia, Canada, the European Union, France, Germany, Israel, Italy, Japan, Korea, Mexico, South Africa, the United Kingdom, the United States and Zambia.
98 On the history and creation of the ICN, see Y. Devellennes, G. Kiriazis, 'The Creation of an International Competition Network', *Competition Policy Newsletter*, 2002, iss. 1, pp. 25 ff.

The ICN was created and remains a virtual structure – a platform for cooperation that does not require a physical presence. It was emphasised from the outset that the ICN would not be a network based on 'bricks and mortar', but on the cooperation of its members, which would not require them to commit unnecessary forces or resources.[99]

The establishment of an international network dedicated to the protection of competition was first formulated in the final report[100] of the International Competition Policy Advisory Committee (ICPAC). ICPAC was established in 1997 to consider global competition law issues, including multi-jurisdictional concentrations, the relationship between antitrust and trade regulation and cooperation between NCAs.[101] In 2002, ICPAC recommended the creation of a Global Competition Initiative in which representatives of NCAs, businesses and practitioners could meet to discuss current competition law issues. The initiative would aim to encourage the convergence of national laws, increase mutual understanding and build a competition culture. This was endorsed by EU Competition Commissioner Mario Monti and Joel Klein of the US Justice Department. The details of the establishment and shape of the new organisation dealing exclusively with competition law were decided at a meeting organised by the International Bar Association in Ditchley Park (England) in February 2001, leading to the establishment of the ICN in New York in October that year.[102]

The ICN grew out of the needs of practice rather than as a theoretical concept. This stems from the observation that the globalisation of trade transformed international competition rules from a theoretical problem into a pressing practical issue that could not be resolved through the formal methods of public international law. This is why an open competition network was created, actively involving private parties and able to achieve a high degree of convergence between its members, leaving each of them free to adapt their national regulations to international best practice at their own pace.[103] Some argue that the preference to establish an informal TCN instead of developing cooperation among NCAs within an existing international organisation (eg, the OECD or the WTO) was driven by the desire to limit formal control of states and allow NCAs to act alone and independently.[104] It should also not be forgotten (as mentioned in more detail when describing the OECD) that the ICN was born out of rivalry between the European Union and the United States as a counterweight to the OECD and other initiatives, providing a competitive route to the creation of international

99 B. Zanettin, *Cooperation between Antitrust Agencies at the International Level*, Oxford, Hart, 2002, p. 238.

100 ICPAC Final Report, 2000, https://www.justice.gov/atr/final-report (accessed 24 July 2021).

101 US Department of Justice, International Competition Policy Advisory Committee, https://www.justice.gov/atr/icpac (accessed 24 July 2021).

102 ICN, About, https://www.internationalcompetitionnetwork.org/about/ (accessed 24 July 2021).

103 R.W. Damtoft, R. Flanagan, 'The Development of International Networks in Antitrust', *The International Lawyer*, vol. 43, iss. 1, 2009, p. 150.

104 Ch. Townley, M. Guidi, M. Tavares, *The Law and Politics of Global Competition*, p. 56.

competition law rules and a place for NCAs to cooperate.[105] However, these original reasons appear to have faded over time and the ICN is now the most important universal forum for cooperation among NCAs.[106]

3.4.2 Legal basis

The network is based on an informal agreement concluded by the NCAs, is referred to as the Memorandum on the Establishment and Operation of the International Competition Network.[107] This is a four-page document regulating the basic organisational issues of the ICN, including membership, non-governmental advisers, a management group and Secretariat. In addition, the memorandum sets out the objectives and modalities of the network and its funding. In 2012, the memorandum was replaced by a new document – the International Competition Network Operational Framework.[108] The framework document is supplemented by two additional documents: the ICN Event Hosts Selection Criteria[109] and the ICN Steering Group Chair Selection Process.[110] These documents reflect the maturity of the ICN, which had begun to formalise its operations and codify informal existing rules. It was also necessary since the ICN membership had reached over 100 and its internal organisation needed to be codified and optimised.

3.4.3 Network aims

The aim of this international cooperation platform is for members to work together on the implementation of competition law. This means that the network is strictly

105 G.B. Doern, S. Wilks, 'Conclusions', in G.B. Doern, S. Wilks (eds), *Comparative Competition Policy. National Institutions in a Global Market*, Oxford, Clarendon Press, 1996, p. 338.

106 Moreover, it seems that with time, the Directorate General of Competition (the unit responsible for competition policy within the European Commission) has begun to prefer cooperation within the ICN as opposed to the OECD or the UNCTAD. This is explained as, 'within intergovernmental IOs like UNCTAD and OECD, DG Competition occupies only an observatory status, while it is a full member and the exclusive representative of the EU Commission within the International Competition Network, where it has always been a member of the Steering Board and co-chaired a number of working groups' – M. Botta, 'The EU and Global Networks', in G. Falkner, P. Müller (eds), *EU Policies in a Global Perspective: Shaping or Taking International Regimes?*, London, Routledge, 2013, p. 82.

107 ICN, Memorandum on the Establishment and Operation of the ICN, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/07/ICNMemo_on_Establishment.pdf (accessed 24 July 2021).

108 ICN Operational Framework, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/07/ICNOperationalFramework.pdf (accessed 24 July 2021).

109 ICN Event Hosts Selection Criteria, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/07/ICNEventsCriteria.pdf (accessed 24 July 2021).

110 ICN Steering Group Chair Selection Process, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/07/ICNChairProcess.pdf (accessed 24 July 2021).

specialised and limited to one thematic area: competition protection. The ICN was created by and for NCAs. The ICN strongly emphasises this fact by pointing out that it is neither an international nor an intergovernmental organisation.[111] This informal mode of establishment determines the nature and objectives of the network. The ICN is first and foremost a project organisation – it focuses on carrying out projects of interest to its members, with the ultimate goal of promoting the convergence of national procedural and substantive rules. All activities within the ICN are undertaken by NCAs on a voluntary basis and decisions are reached by consensus.

The ICN aims to disseminate the experiences and best practices of NCAs and seeks to facilitate their international cooperation. The ICN provides opportunities for members to maintain regular contact, in particular through an annual conference and regular workshops. When ICN members reach agreement on recommendations arising from a particular project, it is left to them to decide whether and how to implement those recommendations (eg, through unilateral, bilateral or multilateral agreements). The ICN thus seeks to advance the convergence of national competition laws through the development of global competition standards.[112] At the same time, however, this convergence does not presuppose the homogenisation of national laws, which is unachievable and unnecessary. While recognising the validity of the global competition standards adopted, each NCA should be able to adapt them to its local legal system.[113]

3.4.4 Membership

The network brings together national and transnational competition authorities. Where in a given country competition powers are distributed among several authorities, any of them can be a member of the ICN. This is because the network is open and any authority that accepts the principles of the ICN can join. All members of the network have equal rights. Currently, 132 competition authorities from 119 countries belong to the ICN.[114] Apart from the NCA from China,[115] the ICN engages all jurisdictions that actively enforce their competition laws. After the Russian invasion of Ukraine, the ICN decided to suspend Russia's participation in ICN activities on 8 March 2022.[116] This was the first time in the history of

111 ICN Factsheet and Key Messages, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/Factsheet2009.pdf (accessed 24 July 2021).

112 H.M. Hollman, W.E. Kovacic, A.S. Robertson, 'Building global antitrust standards. The ICN's practicable approach', in A. Ezrachi (ed), *Research Handbook on International Competition Law*, pp. 90–91.

113 Ibid, pp. 92–93.

114 ICN, About, https://www.internationalcompetitionnetwork.org/about/ (accessed 24 July 2021).

115 Interestingly the Competition Commission of Hong Kong formally remains a member of ICN – https://www.compcomm.hk/en/about/international_liaison/overview.html (accessed 24 July 2021).

116 ICN Chair's Statement, https://www.internationalcompetitionnetwork.org/news/chair-statement-2022march/ (accessed 24 March 2022).

the network that a member agency was suspended. The decision has been supported by the international antitrust community.[117]

Non-governmental advisers (NGAs) – that is, representatives of other international organisations (eg, the OECD or the World Bank), academics, business lawyers and professional attorneys – may also participate in the work of the ICN. Their participation is seen as a key element of its success – not only as a means of securing additional expertise in the field, but also by assuring that the work of the network will be bought into by national authorities and other decision-makers.[118] They participate in the work of most bodies within the ICN, including preparing reports and other soft law documents, which are then adopted by ICN members. The number of NGAs varies from jurisdiction to jurisdiction. There is also a visible critique of overrepresentation of NGAs from rich jurisdictions (the European Union and North America), which translates into greater influence for 'their' NCAs.[119] In order to help members of the ICN to choose appropriate NGAs, the network has prepared an NGA toolkit.[120] As the document explains, the NGA toolkit has been produced to provide guidance to member agencies and to existing and prospective NGAs on NGA engagement. NGAs are competition experts from all backgrounds – lawyers and economists in private practice, in-house counsel, representatives of non-governmental international organisations, members of industry and consumer groups, academics and judges – who volunteer to contribute to the ICN's work. Moreover, the ICN has established an NGA liaison whose mandate is to better engage NGAs to participate in the ICN, so that the network can benefit from a wide spectrum of views and interests.

3.4.5 Internal organisation

The ICN is a virtual network, which translates into its internal organisation. It has no permanent secretariat or headquarters. The organisation of the ICN is also as simple and flexible as possible. The work of the ICN is directed by a Steering Group headed by a chair, and work on issues of interest to the network is carried out within working groups. The organisation of the ICN is currently regulated by the International Competition Network Operational Framework.[121]

The ICN has no budget, with all members being responsible for their own expenditure. Recognising that financial burden may constitute a barrier for some

117 For instance, Resolution of the International League of Competition Law. Support to the ICN Decision, https://www.ligue.org/wp-content/uploads/2022/03/2022.03.04-Ad-Hoc-Resolution-of-the-LIDC_-final.pdf (accessed 24 March 2022).

118 R.W. Damtoft, R. Flanagan, 'The Development of International Networks in Antitrust', *The International Lawyer*, vol. 43, iss. 1, 2009, p. 149.

119 Ch. Townley, M. Guidi, M. Tavares, *The Law and Politics of Global Competition*, pp. 122 ff.

120 ICN, NGA Toolkit, https://www.internationalcompetitionnetwork.org/portfolio/icn-nga-toolkit/ (accessed 24 July 2021).

121 ICN Operational Framework, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/07/ICNOperationalFramework.pdf (accessed 24 July 2021).

agencies to actively participate in meetings of the ICN, a mechanism of financial aid has been developed. It is regulated in Travel Funding Guidelines.[122]

The Steering Group manages the work of the ICN. It has organisational and programming competences. First, it establishes working groups, elects their administrators, defines the themes of their work and supervises them. It also approves projects and appoints leaders for special projects, and proposes guidelines and other soft law documents to be adopted by the ICN. Second, it selects the venue of the ICN Annual Conference and approves the NCA that will serve as host; it also approves the programme and invitations to the conference. The Steering Group is composed of ICN members, with its composition determined at the Annual Conference. In addition, *ex officio* members of the Steering Group include bodies that hosted the ICN Annual Conference in the previous year and are hosting it in the current year. Despite these very democratic provisions, the composition of the Steering Group remains almost unchanged, which puts NCAs from the most developed countries in a privileged position. The Steering Group elects the ICN chair for a two-year renewable term. The selection of the chair of the ICN is regulated by the ICN Steering Group Chair Selection Process.[123] The role of the ICN chair is primarily representative, but also administrative. Undoubtedly, it is also an expression of the prestige and esteem of a particular NCA within the ICN. The Steering Group, after consultation with the chair, selects up to two ICN vice chairs.

The primary role in the ICN is played by working groups, through which most of the work and activities undertaken by ICN members take place. Currently, the following working groups operate within the ICN:

- Advocacy: The group's role is to support the activities of the NCAs in promoting and conducting competition policy. These include activities concerning existing and proposed public regulations affecting competition. The group is also tasked with developing the abilities of NCAs to build public support for competition. It is one of the longest-running working groups.
- Agency Effectiveness: Formerly the Competition Policy Implementation Group, this group aims to analyse issues that contribute to the effective enforcement of competition rules, such as institutional and operational features of the construction of NCAs.
- Cartel: This group deals with anti-cartel enforcement issues, including cartel prevention, detection, investigation and prosecution, both domestically and internationally.
- Merger: This was established as one of the ICN's first initiatives. It promotes the adoption of best practices in the design and operation of merger control

122 ICN Travel Funding Guidelines, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/07/ICNTravelFundingGlines.pdf (accessed 24 July 2021).

123 ICN Steering Group Chair Selection Process, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/07/ICNChairProcess.pdf (accessed 24 July 2021).

systems to enhance the effectiveness of merger control mechanisms in each jurisdiction. The working group has developed recommended practices and practical guidance on the design and operation of merger control systems.
- Unilateral Conduct: The main objective of this group is to develop issues relating to countering anti-competitive unilateral conduct by dominant undertakings and promoting greater convergence and fair enforcement of the rules governing abuse of a dominant position.

Any ICN member may participate in the activities of any working group. As a rule, agencies delegate case handlers to participate in the activities of working groups. NGAs and invited guests, such as academics, also participate in the working groups. The ICN working groups have been praised for the involvement of economists from NCAs, giving a sounder economic background to many of the ICN's work products and achieving greater linguistic and conceptual coherence among the NCAs.[124]

Previously, there were three additional working groups within the ICN:

- Enforcement of Competition Rules in Regulated Sectors: This group dealt with the application of competition rules in regulated sectors, as well as defining the relationship between NCAs and sectoral regulators.
- Telecommunications: This group dealt with issues of the application of competition law in the telecommunications sector.
- Capacity Building/Implementation of Competition Policy: This working group identified key elements that would help to build the effective capacity of NCAs and assist in the implementation of competition policy in developing economies in transition.

The issued covered by past ICN working groups reflect the phases of the organisation's development, including the initial preoccupation with fundamental issues of the construction of NCAs and the tendency to create thematically narrow working groups. Today, a horizontal approach prevails.

Apart from the subject-matter working groups, in 2020 the ICN established the Promotion and Implementation (P&I) Group.[125] The group was established as part of a wider ICN initiative to disseminate the ICN's work product. The group is co-chaired by the Portuguese Competition Authority, Mexico's Federal Economic Competition Commission and the US Federal Trade Commission, joined by working group chairs and other interested members. Its wide and diversified membership suggests that the group intends to integrate all ICN efforts in promoting the ICN's achievements. The group is responsible for producing and updating the *Work Product Catalogue* to raise awareness of the ICN's core

124 M. Mandorff, 'Engaging Economists in the ICN: Uniting under a Common Language', in P. Lugard, D. Anderson (eds), *The ICN at Twenty*, p. 223

125 ICN, Mission, https://www.internationalcompetitionnetwork.org/working-groups/icn-operations/implementation/ (accessed 24 July 2021).

consensus work product across its various working groups. Furthermore, the P&I Group coordinates with working group chairs to provide implementation assistance to members interested in learning more about the ICN's work product on specific topics. Finally, the P&I Group aims to develop further initiatives to raise awareness of the ICN's work product and to promote its implementation, engaging members, working groups and NGAs.[126]

The ICN is a decentralised and project-oriented organisation. The growth of the network has brought with it the problem of coordinating all working groups and the Steering Group.[127] Some coordinating efforts have been made, but it probably needs more fundamental improvement as the network has become too large and diversified to rely on the existing operational framework.

3.4.6 Forms of activity

With its informal organisation and flexible working methods, the ICN provides a forum for the exchange of ideas and views, resulting in joint recommendations and good practice. While the network's activities are mainly virtual, real-world meetings include the ICN Annual Conference, working group workshops and meetings of the Steering Group. The ICN Annual Conference is the most important meeting of all ICN members, as this is the body in charge of electing the Steering Group and adopting documents and other soft law on behalf of the ICN. Conferences include plenary sessions and working meetings on all topics on which ICN working groups have worked, as well as special projects. It is cross-cutting in nature and generally involves presidents of bodies and senior officials. Workshops are organised by individual working groups and address specialised topics discussed in those groups. They have a practical dimension and are often attended by senior officials directly involved in the issues under discussion. Steering Group meetings are irregular and often take place on the margins of other events, such as meetings of the OECD Competition Committee, the European Competition Network (ECN) or UNCTAD. The ICN's primary form of activity, however, is virtual contact via telephone or Internet in the form of teleconferences or webinars. In the working groups, experiences are exchanged and current topics of interest to the respective group are discussed. It is also within the working group forum that documents are produced, which are then approved at the Annual Conference.

The ICN's work mainly results in soft law documents (guidelines or best practices), along with studies and analyses that assist in the practical application of competition law. The basis of the ICN's work is persuasion (which is what soft law is for), rather than the establishment of binding legal norms (eg, a potential international competition agreement).[128] In addition, the ICN is developing a

126 Ibid.

127 A. Tonazzi, 'The Times They are A-Changing: What ICN for the Next Decade?', in P. Lugard, D. Anderson (eds), *The ICN at Twenty*, p. 414.

128 H.M. Hollman, W.E. Kovacic, A.S. Robertson, 'Building global antitrust standards', pp. 94 ff.

technical assistance programme. This includes both on-site assistance and the development of e-learning courses. The ICN supports mutual assistance between NCAs – new authorities are provided by those with a long history and practice.

To improve the visibility of the ICN and to increase the network's influence, there are suggestions that it should take a more active role in the global debate on competition policy issues or competition law hot topics by issuing consensus-based, high-level resolutions.[129] However, engaging in international debates on public policy poses a risk for the network. The ICN should be politically neutral, as competition policy may be regarded as technocratic and expert based, there is a risk of it being politicised as a result of such engagement. In addition, the consensus needed to reach such resolutions may be much harder to achieve and carries the risk of creating national or political divisions among ICN members.

3.4.7 Network output

The ICN is not an international organisation and has no sovereign powers. As a result, it has many more members and its potential impact is broader than, for example, that of the OECD.[130] The ICN is a project-based organisation with no fixed agenda. This allows it to be fully flexible in its functioning and to continuously adapt to the needs of members. The ICN's tangible output is mainly soft law – reports, manuals and other papers prepared by individual working groups and accepted at the Annual Conference. A comprehensive list of all works produced by the ICN may be found in the work products catalogues (*ICN Work Products Catalogue (June 2016)*[131] and *Summary of ICN Work Product 2016–2017*;[132] ICN *Work Products Catalogue (September 2019)*).[133] The latest news on prepared products in the current year may be found on a dedicated website.[134] It is important to note the huge variety of documents produced and the periodic attempts made to update them. These updates are particularly important as they reflect developments in competition law and practice.

The ICN maintains a very extensive website on which all these documents are available. There are also courses aimed at competition law professionals containing

129 A. Tonazzi, 'The Times They are A-Changing', p. 407.
130 Y. Devellennes, G. Kiriazis, 'The Creation of an International Competition Network', p. 26.
131 ICN, Work Products Catalogue. Advocacy and Implementation Network (AIN), June 2016, http://www.internationalcompetitionnetwork.org/uploads/library/doc1002.pdf (accessed 3 May 2019).
132 Summary of ICN Work Product 2016–2017. Presented at the 15th Annual Conference of the ICN, Porto 2017, http://www.internationalcompetitionnetwork.org/uploads/library/doc1100.pdf (accessed 3 May 2019).
133 ICN, Work Products Catalogue September 2019, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/11/ICNWPCatalog9-2019.pdf (accessed 22 July 2020).
134 ICN, 2020 Annual ICN Work Product, https://www.internationalcompetitionnetwork.org/featured/2020-annual-icn-work-product/ (accessed 22 July 2020).

extremely extensive training in competition law and policy.[135] This is the result of the *ICN Training on Demand* project, which aimed to create a 'virtual university' of competition law and policy. Unfortunately, one difficulty in using the ICN website is the constant changes and updates made to the site, which may improve its appearance but have a negative impact on navigation and access to individual (especially older) documents.

It is worth mentioning that the ICN has established a network of contact points for cooperation on multi-jurisdictional concentrations. All the NCAs concerned can designate officials in their offices who will be responsible for such cooperation and will serve as a first contact for other authorities on multi-jurisdictional concentrations. The list of contact points is continually updated, which is the responsibility of the Japanese NCA. It is difficult to determine the extent to which NCAs actually use this list; but the fact that it is regularly updated shows that the project is considered by ICN members as still relevant and necessary.

One less tangible, but in practice very important output of the network is the numerous workshops and conferences held each year, in addition to teleconferences and webinars, which are even more frequent. These provide an opportunity for NCAs to get to know each other, share experience and learn from each other. In the long term, this has become crucial to the ICN's success.[136]

3.4.8 Form and scope of cooperation

The ICN is a virtual information and harmonisation network. This means that participation is not linked to any formal administrative acts by the relevant NCAs, but is contained in non-binding acts and deeds. The ICN affects NCAs in two ways: on the one hand, it establishes guidelines and practical aids for conducting proceedings; and on the other hand, it enables NCA officials to get to know each other and improve their skills. This harmonising aspect of the ICN is sometimes criticised as being inadequate to meet the challenges of a globalised economy and the need to address competition infringements in the global sphere.[137] This criticism can only partly be considered valid. In a situation where an international agreement on competition policy is unrealistic, harmonisation efforts are the only form of cooperation that the jurisdictions concerned can agree on. Moreover, although this may not happen in the foreseeable future, the degree of harmonisation achieved through the ICN may one day prepare the ground for the adoption of a relevant international agreement.

The ICN undertakes efforts to establish more permanent and effective mechanisms for international cooperation in the form of a framework. At present, there are three frameworks: for merger review cooperation, the promotion of the

135 ICN, Training on Demand, https://www.internationalcompetitionnetwork.org/training/ (accessed 24 July 2021).

136 For a more detailed review of the achievements of the ICN working groups, please refer to G. Jarvie, M. Pacillo, '2010–2020 Achievements of the ICN Working Groups', in P. Lugard, D. Anderson (eds), *The ICN at Twenty*, pp. 43 ff.

137 B. Zanettin, 'The Evolution of the EC International Competition Policy', in G. Amato, C.-D. Ehlermann, *EC Competition Law. A Critical Assessment*, Oxford, Hart, 2007, p. 795.

sharing of non-confidential information and competition agency procedures. What is interesting is that the frameworks were not initially perceived as a priority for the ICN. The first two frameworks have been functioning for years, serving their purpose albeit without any overwhelming success. The more complex and far-reaching consequences may be effected by the newest framework, on competition agency procedures. Frameworks are distinguished by the fact that they are voluntary, so all participating agencies have an opt-in option.

Historically, the first framework to be established was the ICN Framework for Merger Review Cooperation. This is a non-binding framework established in 2012. It is intended to facilitate effective and efficient cooperation between and among ICN member agencies by identifying each agency's liaison officers and possible ways in which to exchange information. The framework includes creating a list of liaison officers who act as the contact persons in the participating agencies; and establishing ways to contact and exchange information with other relevant agencies.[138] It is hard to assess the impact of this framework. There is no publicly available data on how often the mechanism is used in practice. Nevertheless, maintaining an up-to-date contact list for merger control cooperation may be regarded as useful by some agencies.

The second framework aims to promote the sharing of non-confidential information. The Cartel Working Group established this framework in 2016 as a way to improve cooperation between member agencies. This framework is intended to assist competition agencies in knowing how and whom to contact when seeking non-confidential information from foreign counterpart agencies.[139] The framework builds on the experience and probably positive feedback from the enforcement of the merger control framework. However, as in the previous case, there is no publicly available data on how often this mechanism is used in practice. In principle, an up-to-date contact list for cartel cooperation should be a useful tool among the cooperation mechanisms of the ICN.

The most interesting framework is the ICN Framework for Competition Agency Procedures (CAP). The history of this framework is quite thought-provoking. During the Trump administration, the US Department of Justice took the initiative to adopt the Multilateral Framework on Procedures in Competition Law Investigation and Enforcement (MFP).[140] This aimed to establish agreement among competition agencies around the world on fundamental procedural norms.[141] The MFP was designed to become the first international competition agreement. Furthermore, there was a desire to fully engage the Chinese NCA in international cooperation and

138 ICN, ICN Framework for Merger Review Cooperation, 2012, https://www.internationalcompetitionnetwork.org/portfolio/icn-framework-for-merger-review-cooperation/ (accessed 24 July 2021).

139 ICN, Framework for the Promotion of the Sharing of Non-confidential Information (Continued Operation), 2016, https://www.internationalcompetitionnetwork.org/portfolio/non-confidential-information-sharing/ (accessed 24 July 2021).

140 M. Delrahim, *Fresh Thinking on Procedural Fairness: A Multilateral Framework on Procedures in Antitrust Enforcement*, Address Before the Council on Foreign Relations (1 June 2018), https://www.justice.gov/opa/speech/file/1067582/download (accessed 24 July 2021).

141 Ibid.

make it bound by formal commitments. At first, the MFP was presented to a selected group of agencies representing civil and common law jurisdictions from all regions of the world, with the aim of having a relatively small group with diverse representation reach a consensus before presenting the proposal to a larger group. Later, in 2018, several meetings and discussions were held with the participation of more than 40 countries.[142] However, the MFP faced more or less open criticism from the European Union and certain other jurisdictions. For many jurisdictions, such an agreement would require legislative changes and lacked political support. Moreover, the initiative in its initial form was perceived as a political effort that could benefit the United States and strengthen US corporations against competitors from smaller jurisdictions – not to mention undermining the significance of existing mechanisms of international cooperation provided by the ICN, OECD and UNCTAD.

The only achievable result turned out to be the establishment of the CAP. Although the first ambitious plan and its political agenda failed, the CAP should still be applauded because, for the first time in history, competition authorities from around the world entered into a multilateral framework on due process that included core due process protections and meaningful review mechanisms.[143] The CAP is regulated in a separate document.[144] An integral part is constituted by the ICN Guiding Principles for Procedural Fairness in Competition Agency Enforcement[145] and Recommended Practices for Investigative Process.[146] These two guidelines provide for substantive – even if soft – rules and principles that the CAP members should observe. CAP confirms and codifies common fundamental procedural principles that NCAs need to follow when applying competition laws. These principles can be grouped around six rules:

- non-discriminatory treatment;
- the transparency of the applicable rules;
- the opportunity to defend oneself;
- the protection of confidentiality;
- the publication of written decisions; and
- judicial review.[147]

142 R.W. De Araujo, *The International Competition Network (ICN) and the Framework on Competition Agency Procedures (CAP): Strengthening Fairness in Competition Law Enforcement* (28 April 2020), p. 7, DOI: 10.2139/ssrn.3622141.

143 R.P. Alford, 'Promoting International Procedural Norms in Competition Law Enforcement', *UKLR*, vol. 68, 2020, p. 1165.

144 See ICN CAP, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/04/ICN_CAP.pdf (accessed 24 July 2021).

145 ICN, Guiding Principles for Procedural Fairness in Competition Agency Enforcement, https://www.internationalcompetitionnetwork.org/portfolio/guiding-principles-for-procedural-fairness/ (accessed 24 July 2021).

146 ICN, Recommended Practices for Investigative Process, https://www.internationalcompetitionnetwork.org/portfolio/recommended-practices-for-investigative-process/ (accessed 24 July 2021).

147 E. De Smijter, F. Kubík, 'ICN Framework for Competition Agency Procedures (ICN CAP)', *CLPD,* vol. 5 iss. 4 & vol. 66, iss. 1, 2020, p. 109, DOI: 10.4337/clpd.2020.01.09.

The CAP also establishes a procedural mechanism for disputes and cooperation.

Participation in the CAP is voluntary and is open to any NCA, irrespective of membership in the ICN. While this solution may have been adopted in a failed bid to attract the engagement of the Chinese NCA, this effort was generally successful. When an agency intends to join the CAP, it must prepare a template summarising the procedure applicable in competition cases. Those templates are publicly available and undertakings may treat them as a reliable source of information.[148] Unfortunately, templates are not yet available for all jurisdictions. The CAP offers an opt-out option. If domestic legislation prevents an agency from following one or more rules forming the CAP, it may opt out. This is important as it allows for the flexibility of the CAP framework and no particular principle serves as a barrier to participation in the framework. Initially, 70 jurisdictions adhered to the CAP. When the CAP was introduced, the work plan was prepared to attract agencies to the CAP and to make the CAP a living mechanism.[149] However, for the first two years, the instrument failed to attract many new jurisdictions.[150]

The ICN explained this by saying that the CAP is designed to strengthen procedural fairness in competition law enforcement. Although the CAP is non-binding, by joining the CAP, each participant agrees that it intends, in good faith, to adhere to the framework to the extent consistent with applicable domestic laws.[151] It is important to remember that, through the CAP, competition authorities are promising one another to respect due process and submitting to a series of review mechanisms to help ensure that respect.[152] What is unique about the CAP is the possibility of one NCA approaching its counterpart to invoke the CAP to remedy the action of that other NCA undertaken in proceedings regarding the undertaking coming from the first NCA. The CAP allows NCAs to become advocates of procedural fairness against each other in favour of undertakings. The CAP is built on reputations and such dialogue is essential to sustain it.[153]

The ICN CAP adds another layer to the various instruments produced at the international level, with the objective of promoting respect for the fundamental principles of procedural fairness in competition investigations and enforcement.[154] Some commentators stress that the CAP provides not only guidance, but also a mechanism by which to measure and evaluate the extent to which nations

148 ICN, CAP Templates, https://www.internationalcompetitionnetwork.org/frameworks/competition-agency-procedures/cap-templates/ (accessed 24 July 2021).

149 ICN, CAP Work Plan, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/11/CAPworkplan2019-20.pdf (accessed 24 July 2021).

150 As of August 2021, there were 73 participating NCAs (out of 132 ICN members), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2021/09/CAP-participants-list-August-2021.pdf (accessed 14 September 2021).

151 ICN Framework for Competition Agency Procedures (CAP), https://www.internationalcompetitionnetwork.org/frameworks/competition-agency-procedures/ (accessed 24 July 2021).

152 R.P. Alford, 'Promoting International Procedural Norms', p. 1180.

153 R.W. De Araujo, *The International Competition Network*, p. 8.

154 E. De Smijter, F. Kubík, 'ICN Framework for Competition Agency Procedures', p 113.

implement due process norms.[155] However, the actual impact of the CAP on domestic laws and administrative practice relies on the reputation of a particular jurisdiction. Time will tell whether this is an efficient sanction system.

3.4.9 Network characteristics: summary

The ICN is a non-formalised, open horizontal network that functions independently of other international organisations. It is primarily an information and harmonisation network. As a non-formalised network, it has essentially no administrative functions. The network has a global dimension and is the largest network, bringing together virtually all NCAs (with the most noticeable exception of mainland China). In the view of some commentators, the establishment and operation of the ICN are considered a success that has significantly exceeded expectations; and the network itself has fitted very well with the need to develop global competition law.[156]

The ICN has nonetheless come in for a certain degree of criticism. Some authors raise the problem of influence, which is excessively exerted by developed Western NCAs and multinational NGAs on younger or less resourceful agencies.[157] Moreover, some authors critically assess the ICN's (lack of) proper legitimacy.[158] Others refer to the fact that the network is not fully able to transcend the national limitations of its members. This is exemplified by the best practices on leniency, combining European and US experiences, including negative ones, while ignoring criticism of the adopted solutions in the internal arena. According to critics, the ICN should create added value, rather than adopting experiences from various jurisdictions that are not fully compatible with each other.[159] For this reason, there have been calls for the external evaluation of the guidelines adopted by the ICN and the creation of a transparent mechanism for their revision.[160] In this context, it is worth mentioning that another problem of the ICN is the lack of thorough monitoring of the implementation of the adopted guidelines. There are no formal mechanisms to encourage network members to adhere to the guidelines and no ways to enforce such adherence. This results in varying degrees of national compliance with ICN guidelines, as is well demonstrated by some of the oldest merger

155 J.F. Rill, J.I. Seidl, 'ICN Due Process Initiatives over the Decades and the CAP's Promise of Accountability', *The Antitrust Source*, 2021, p. 7.

156 E.M. Fox, 'Linked-In. Antitrust and the Virtues of a Virtual Network', p. 134.

157 Ch. Townley, 'Where Influence Lies in the International Competition Network', in D. Bosco, M.S. Gal (eds) *Challenges to Assumptions in Competition Law*, Cheltenham, Edward Elgar Publishing, 2021, p. 159.

158 Ch. Townley, M. Guidi, M. Tavares, *The Law and Politics of Global Competition*, pp. 232 ff.

159 P. Van Uytsel, 'The International Competition Network, Its Leniency Best Practice and Legitimacy. An Argument for Introducing a Review System', in M. Fenwick, P. Van Uytsel, S. Wrbka (eds), *Networked Governance*, p. 186.

160 Y. Svetiev, 'The Limits of Informal International Law. Enforcement, Norm Generation, and Learning in the ICN', in J. Pauwelyn, R. Wessel, J. Wouters (eds), *Informal International Lawmaking,* Oxford, OUP 2012, pp. 285–290.

control guidelines.[161] There are no formal peer reviews; and the only opportunity to verify compliance of national regulations with the guidelines is through periodic national regulation review projects or updates. In this respect, the CAP seems to offer a remedy, as it provides for a more formal review of national legislation and creates a mechanism through which to open disputes on proper adherence of a particular NCA to agreed standards.

There is an open question as to whether the CAP framework will establish a new way to achieve and enforce common procedural standards agreed by the ICN members. The development of the CAP is one of the priorities of the network, as the ICN has invested significant efforts in preparing and adopting this framework.[162] The CAP is also perceived as a blueprint for the direction in which the ICN will evolve over the next decade.[163] US commentators have tried to show enthusiasm, claiming that, after more than a decade of recommendations and guidelines encouraging best practices, the international competition community has finally taken a quantum leap with an agreement that obliges competition authorities to respect fundamental due process.[164] Therefore, the CAP is seen as a means of actual rather than aspirational convergence.[165] It is hard to share such unequivocal optimism, however. The CAP is surely reminiscent of the ambitious MFP project, being a compromise between leading competition jurisdictions. The inclusion of this framework within the ICN will benefit this network by confirming its essential role in international antitrust. On the other hand, if the CAP mechanism is actually executed against one of the ICN members for non-compliance with the agreed standards, this may prove very disruptive to the ICN homeostasis. It remains to be seen whether these predictions will be realised.

3.5 Concluding remarks

The plurality of global TCNs is sometimes regarded as an obstacle to the development of an effective system of global competition protection.[166] The coexistence of global TCNs has been questioned in terms of both resource efficiency and commitment. It would be better to concentrate on one of the ways of creating a workable framework for international competition in due course. Complementary coexistence would raise the question of competence allocation; and with the long-term aims of the two approaches being not too different, a clear-cut

161 J.W. Rowley, A.N. Campbell, 'Implementation of the International Competition Network's Recommended Practices for Merger Review. Final Survey Report on Practices IV-VIII', *World Competition,* vol. 28, iss. 4, 2005, p. 559.

162 A. Mundt, 'Who is Global if Not the ICN? ICN Milestones and the Future of the Agencies Network', in P. Lugard, D. Anderson (eds), *The ICN at Twenty,* p. 245.

163 L. McCoy, 'ICN's Evolution from Start-Up to Global Leader', in P. Lugard, D. Anderson (eds), *The ICN at Twenty,* pp. 346–347.

164 R.P. Alford, 'Promoting International Procedural Norms', p. 1180.

165 J.F. Rill, J.I. Seidl, 'ICN Due Process Initiatives', p. 8.

166 M. Bode, O. Budzinski, 'Competing Ways Towards International Antitrust: the WTO versus the ICN', *Marburg Papers on Economics*, iss. 3, 2005, p. 24, http://www.wiwi.uni-marburg.de/Lehrstuehle/VWL/WIPOL/Fodiskp.htm (accessed 3 October 2021).

solution seems doubtful.[167] These arguments were valid in the first decade of the 21st century, when the fate of the WTO's efforts had been decided. However, although global TCNs still compete for the resources of NCAs, it seems that a new equilibrium has been established: each functioning TCN performs a specific function, and NCAs can easily transfer their resources to the network they deem most responsive to their needs. The complementary coexistence of TCNs is vivid proof that no clear-cut solution is achievable for an international antitrust framework. Furthermore, the specific feature of global TCNs is that they may be seen primarily as sites of information and knowledge that do not demand active participation.[168] Therefore, they do not necessarily require as many resources as continental and regional TCNs may need.

The global TCNs described in this chapter illustrate the stages and difficulties in the development of international competition law rules and the international cooperation of NCAs. The first three networks were based on existing international organisations (the OECD, UNCTAD and the WTO). Each of these was to some extent burdened by the heritage and nature of the international organisation on the basis of which it had to operate. Inherent in these networks was a certain politicisation of their activities, depending on the importance and vigour of a particular international organisation during a given historical period. However, the path of basing a global network of NCAs on an international organisation seems to have exhausted itself due to the original limitations of these organisations. In such circumstances, the establishment of a fully independent and non-formalised ICN may be a formula for international cooperation accepted universally by NCAs from around the world. Although the ICN was initially also politically charged as part of the US agenda to counterbalance the OECD, and to increase the attractiveness of the US model of competition law and policy at the expense of the EU model, over time the ICN permanently assumed the role of the primary global forum for cooperation among NCAs. Some have proposed that the ICN evolve into 'network of networks'.[169] This regime would allow for the participation of more advanced regional groups of NCAs; while the ICN would remain the universal platform for promoting dialogue and drawing up common standards. This vision is tempting, but unrealistic. Although the ICN provides an additional forum for other networks (eg, the African Competition Forum and the Association of Southeast Asian Nations), and offers technical assistance to those networks when needed, continental and regional TCNs are often driven by different interests and are closely linked to existing continental and regional cooperation and/or integration schemes. Furthermore, continental and regional TCNs are often administrative networks; while the ICN is basically an information and harmonisation network. Last but not least, such an evolution may not be in the interests

167 Ibid.

168 I. Maher, 'International Competition Law?', in S. Muller, S. Zouridis, M. Frishman, L. Kistemaker (eds), *The Law of the Future and the Future of Law,* Vol. II, The Hague, Torkel Opsahl Academic EPublisher, 2012, p. 302.

169 Y. Svetiev, 'Governance Design of the Regulatory Network: The ICN as an Experimentalist Network?', in P. Lugard, D. Anderson (eds), *The ICN at Twenty,* p. 368.

of other global TCNs such as the OECD and UNCTAD – not to mention other networks such as the ECN.

The ICN represents 'a community scenario' for the development of international antitrust, with the idea of establishing a transnational space in which NCAs can come together to negotiate and reach consensus on the full or partial convergence of regimes and practices, as well as enhanced coordination to deal with new challenges.[170] By contrast, meetings of the OECD and UNCTAD are heavily populated by resident diplomats who are not well versed in competition issues, with much of the work product being driven by a professional secretariat.[171] The failure to establish binding international rules shows that the network and community path of developing international cooperation between NCAs remains valid. The most recent fiasco of the MFP initiative and its transformation into the CAP framework within the ICN may serve as the best argument for this thesis. The introduction of the CAP may be interpreted as a type of formalisation of the ICN. However, taking into consideration its voluntary nature and that the only applicable sanction is a reputation sanction, I am not convinced that this is really such a novelty in terms of a new form of cooperation. The source of the success of the ICN may also be regarded as the source of its weakness. In the long term, while the ICN's informal, voluntary and flexible nature may attract membership, it does not serve the permanent and inevitable transformation of national laws and administrative practice of participating NCAs.

At the same time, it is important not to diminish the past and current role of the OECD and UNCTAD in developing cooperation with NCAs. With a strong analytical background and expertise in promoting convergence and cooperation through soft law, the OECD remains an important player in the common global competition law and enforcement system;[172] whereas UNCTAD offers developing countries its expertise and often technical assistance in adopting and perfecting their competition laws and administrative practice. None of the described global competition networks are isolated islands, as many NCAs participate in some, if not all of them. Therefore, they should be treated as complementary rather than competitive elements of global antitrust. Last but not least, the ICN, the OECD and UNCTAD all offer space for fostering mutual understanding and experience sharing, allowing trust to develop; though none of these forums offers any practical, hands-on assistance in ongoing investigations.[173] Instead, such assistance is provided by some continental and regional competition networks, which function as administrative networks.

170 M.-L. Djelic, Th. Kleiner, 'The International Competition Network – Moving Towards Transnational Governance', in M.-L. Djelic and K. Sahlin-Andersson (eds), *Transnational Governance. Institutional Dynamics of Regulation*, Cambridge, CUP, 2006, pp. 303–305.

171 R.W. Damtoft, R. Flangan, 'The Development of International Networks in Antitrust', *The International Lawyer*, vol. 43, iss. 1, 2019, p. 145.

172 M. Błachucki, 'The Role of the OECD', pp. 199–200.

173 M. Martyniszyn, 'Competitive Harm Crossing Borders: Regulatory Gaps and a Way Forward', *JCLE*, vol. 17, iss. 3, 2021, p. 696.

4 Continental competition networks

Integration processes taking place on individual continents are significantly changing the ways in which states – and consequently, their administrative apparatuses – function. They are also inevitably driving an increase in the scope of continental cooperation between public administration bodies, including national competition authorities (NCAs). Network cooperation, with its flexibility and fundamental lack of hierarchical relationships, seems a natural solution in this case. It is no different for the cooperation of competition authorities taking place within a unified Europe. Unlike networks with a global or regional dimension, European competition networks are the most advanced forms of transnational networks – that is, harmonisation and administrative networks. This chapter therefore devotes considerable space to European competition networks. Within the European Union, transnational competition networks (TCNs) are also beginning to play a role in their own right, becoming part of EU administrative structures. It is somewhat paradoxical that, despite becoming institutionalised, European TCNs usually do not have a clearly defined legal basis for their operation – which seems to be an almost universal feature of TCNs. Against this background, it is interesting to compare networks of European NCAs with TCNs created within other continental or sub-global (comprising states from several continents but without a global dimension) integration associations of states. As indicated at the beginning of this book, the analysis – especially of non-European continental TCNs – is limited to the most important such networks. The selected research sample includes TCNs from practically all continents. Therefore, it appears to be representative and, at the same time, reflects the subject of the analysis – that is, cooperation within TCNs, rather than continental integration organisations themselves.

4.1 Europe

4.1.1 European Economic Area

4.1.1.1 European Competition Authorities

4.1.1.1.1 ORIGIN AND HISTORY

European Competition Authorities (ECA) is an informal and virtual network of European NCAs, which was established on 20 April 2001 in Amsterdam as a forum

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for discussion and the exchange of experience between the NCAs of European Economic Area (EEA) countries. The ECA was to some extent the prototype of the European Competition Network (ECN).[1] The network served as the first institutionalised forum for cooperation between the NCAs of EEA states.[2] The European Commission, however, has clearly emphasised the independence of the ECN and the ECA, and the absence of any relationship between these networks.[3] Today, the ECA is a somewhat less visible or slightly forgotten network, which is not mentioned in most reports or on the websites of many European NCAs.

4.1.1.1.2 LEGAL BASIS

The ECA is an informal network established at a conference of all NCAs of the EEA states. The rules on the functioning of the ECA are set out in the *Discussion Paper on the Operation of the Association*.[4] While the title of this document may suggest that it is only of a preparatory or interim character, it establishes the basis for the activities of the ECA.

4.1.1.1.3 NETWORK AIMS

The ECA aims to improve cooperation between NCAs and strengthen the effective application of national and EU competition law.[5]

4.1.1.1.4 MEMBERSHIP

The ECA comprises all EU member states, the European Commission, members of the European Free Trade Agreement (EFTA) (ie, Norway, Iceland and Liechtenstein) and the EFTA Surveillance Authority (except for Switzerland).

1 L. Idot, 'Le nouveau système communautaire de mise en œuvre des articles 81 et 82 CE', *Cahiers de Droit Européen*, iss. 3, 2003, p. 313.
2 ECN, Documents, http://ec.europa.eu/competition/ecn/documents.html (accessed 24 July 2021).
3 ECN, Frequently Asked Questions, http://ec.europa.eu/competition/ecn/faq.html (accessed 24 July 2021). This view is artificial insofar as the composition of the network is virtually identical and the ECA has also repeatedly dealt with the interpretation of European rules applied within the ECN. Furthermore, the ECN website contains documents adopted by the ECA.
4 See Portuguese Competition Authority, Discussion Paper on the Operation of the Association, January 2001, http://www.concorrencia.pt/vPT/Sistemas_da_Concorrencia/Sistema_Europeu_da_Concorrencia/Associacao_de_Autoridades_de_Concorrencia_Europeias_ECA/Documents/discussion_paper.pdf (accessed 24 July 2021).
5 Portuguese Competition Authority, European Competition Authorities – ECA, https://www.concorrencia.pt/en/international-activity/european-competition-authorities-eca (accessed 24 July 2021).

4.1.1.1.5 INTERNAL ORGANISATION

The ECA is a virtual network and has no physical structures or headquarters. All organisational matters are decided either on an ongoing basis or at an Annual Conference. Within the ECA, there are four working groups, on air transport, multi-jurisdictional mergers, financial services and sanctions. In addition, some ECA member websites indicate that energy[6] and leniency groups have been also active.[7] The website of the Hungarian Competition Authority refers to the activity of working groups on commitments, and on 'strategic issues of prioritisation and how to work with business and consumer stakeholders in that context'.[8] However, this information was not confirmed either by the websites of other NCAs or by direct enquiries made to the Polish Competition Authority. Thus, it can be assumed that the working groups were active in the early years of the ECA's operation, but that they no longer meet. The Annual Conference thus remains the only form of ECA activity.[9]

4.1.1.1.6 FORMS OF ACTIVITY

The activities of the ECA include the organisation of the Annual Conference, which brings together all presidents of the NCAs. Cooperation within the ECA was previously developed through working groups set up as required to deal with current issues in the application of competition law. Both the conferences and the activities of the working groups (in the past) facilitated the exchange of experience between the authorities. The most permanent form of cooperation within the ECA remains the Annual Conference of the heads of the NCAs; and at the administrative level, the ECA facilitates the exchange of information on the notification of multi-jurisdictional mergers.

4.1.1.1.7 NETWORK OUTPUT

The ECA was the first institutionalised forum for cooperation between EEA NCAs. Even following the establishment of the ECN, the ECA remains useful, as it provides an opportunity for the heads of NCAs to meet in an expanded composition, with the European Commission a guest rather than a host. ECA members finance their expenses themselves and are not supported by the European Commission (unlike the ECN). This may explain the limited activities of the network today.

ECA working groups have produced many documents, some of them of a soft law nature. The documents that have been adopted at the ECA are set out in Table 4.1.[10]

6 Czech Office for the Protection of Competition, European Competition Authorities, http://www.uohs.cz/en/competition/international-co-operation/european-competition-authorities.html (accessed 24 July 2021).
7 Hungarian Competition Authority, ECA, http://www.gvh.hu/en/gvh/international_relations/international_organisations/eca (accessed 24 July 2021).
8 Ibid.
9 The most recent ECA meeting took place in Rome on 23–24 September 2021.
10 All documents are available on the website of the Hungarian NCA: https://www.gvh.hu/en/gvh/international_relations/international_organisations/eca/5142_en_eca_ (accessed 24 July 2021).

Table 4.1 Documents produced by the ECA

Principles for Leniency Programmes
The Exchange of Information between Members on Notifications, Proceedings and Decisions in the Field of Air Transport – Procedures Guide
The Principles on the Application, by National Competition Authorities within the ECA, of Articles 4(5) and 22 of the EC Merger Regulation
The Exchange of Information between Members on Multijurisdictional Mergers – Procedures guide
Mergers and Alliances in Civil Aviation: An Overview of the Current Enforcement Practices of the ECA Concerning Market Definition, Competition Assessment and Remedies
Progress Report on Slot Trading
Loyalty Programmes in Civil Aviation
Code-Sharing Agreements in Scheduled Passenger Air Transport
Competition Issues in Retail Banking and Payments Systems Markets in the EU
Comparative Study of Competition in Retail Banking and Payments Systems Markets
Pecuniary Sanctions Imposed on Undertakings for Infringements of Antitrust Law – Principles for Convergence

All these documents have the same status. They are not legally binding, but rather are a declaration of the ECA members' intention to abide by the rules expressed in them within the limits of their competence and the relevant national rules. These documents can therefore be categorised as soft law. A specific feature of these documents is their wording, which is full of vague expressions, often taken from legal rather than juridical language.

From a practical point of view, only the guidelines on the exchange of information on multi-jurisdictional mergers are currently relevant. Guidance on the application of the EU Merger Regulation (EUMR) provisions on referrals is also of some relevance, but there have been many changes in the interpretation of these provisions since the adoption of the ECA guidance. Other documents, although not formally repealed, no longer present any practical use for European NCAs.

There are no plans to amend or even abrogate[11] any of the ECA's documents. The ECN and the EU Merger Working Group (MWG) have taken over the previous role of ECA to elaborate analytical and soft law documents. Therefore, EU NCAs probably do not consider that it is necessary to change any of them and consider them simply as historical output of the network.

4.1.1.1.8 FORMS AND SCOPE OF COOPERATION

At the political level, the importance of the ECA manifests itself in the organisation of meetings of all heads of NCAs of the EEA countries. Cooperation on the

11 Such abrogation would be more than justified in the case of guidelines on Articles 4.5 and 22 of the EU Merger Regulation in the light of recent changes in the EU referral system.

exchange of experience and the drafting of soft law documents at the ECA has effectively died out. As indicated earlier, the MWG, under its mandate, has updated and developed the principles contained in the Guidelines on the Exchange of Information on Multi-jurisdictional Mergers. These are still in use, indicating that the ECA members find them useful in the absence of adequate regulation at the level of EU law. The ECA notice mechanism has proven to be an extremely useful tool in promoting consistency and avoiding conflicting assessments and final decisional outcomes in EU national merger control.[12]

4.1.1.1.9 NETWORK CHARACTERISTICS: SUMMARY

The ECA is an informal and virtual closed horizontal network. While it was previously an information and harmonisation network, it now serves as an administrative network in the field of cooperation on multi-jurisdictional mergers. In this respect, its activities overlap substantially with those of the MWG. In listing the notifications of the ECA, and particularly of the ECA 2,[13] it is difficult to determine precisely whether one is referring to obligations arising from membership of the ECA or of the MWG. Although the original reasons for establishing the ECA no longer exist, the network continues to prove useful, mainly for political reasons. One visible expression of this is the Annual Conference of the NCAs: the agency heads of the ECA countries still find this informal network useful and avail of the opportunity to participate in annual meetings that are not directly related to any administrative cooperation. It is also notable that the ECA has more members than the ECN; and, above all, that the European Commission has limited influence on this network.[14] For some NCAs, the ECA is a less important network, although worth maintaining because of the equality of relations between the national and transnational authorities that participate in it. Moreover, while the activity of NCAs within the ECN has often been subject to a certain degree of ministerial control, within the ECA, NCAs have practically full autonomy from other national authorities and governments.[15] This informal and flexible network, in which participation does not entail special costs on the part of NCAs, seems to meet the needs of these authorities, as it allows them to maintain their independence *vis-à-vis* the European Commission. Deeper integration and the implementation of the ECN+

12 R. Prates, R. Bayão Horta, 'Cooperation in Multijurisdictional Merger Filings: The ECA Notice Mechanism', in M. Błachucki (ed), *International Cooperation of Competition Authorities in Europe: From Bilateral Agreements to Transgovernmental Networks*, Warsaw, ILS PAS Publishing House, 2021, p. 181, DOI: 10.5281/zenodo.5012040.

13 ECA notifications are sent out when multi-jurisdictional mergers are received by the NCAs. ECA 2 notifications are sent out if Phase II merger proceedings are initiated in such a case.

14 S. Brammer, *Co-operation between National Competition Agencies in the Enforcement of EC Competition Law*, Oxford, Hart, 2009, p. 112.

15 P. Lægreid, O.Ch. Stenby, 'Europeanization and Transnational Networks. A Study of the Norwegian Competition Authority', *JPRG,* iss. 25, 2010, p. 18.

Directive can only strengthen the justification for the existence of the ECA in its current form. However, the ECA's role as an information and harmonisation network has long expired and it most likely remains as a political body.

4.1.2 European Union

The European Union is the most advanced form of continental integration and has created administrative structures with diverse legal statuses and competences. For the development of transnational networks of administrations, the European Commission – referred to as a 'hub of transnational networks'[16] – is of key importance. This organisation of the European Commission and of the administration of European affairs has become characteristic of the current stage of EU development, in which the role of transnational (European) networks of administrations has become increasingly important. The situation is no different with regard to European competition law, which has always been one of the most developed elements of European administrative law and has played an important role in the evolution of the European Commission as a typical administrative body issuing decisions concerning private entities.

Before analysing European networks of NCAs, one should not forget the role of the Directorate General for Competition (DG Comp) (formerly DG IV) – the European Commission unit that is responsible for competition law. It has played a fundamental role in developing EU-wide competition policy[17] and is crucial for the proper functioning of networks of NCAs. DG Comp, as the most well-resourced of the competition authorities within the European Union, provides assistance in the daily activities of networks and their members. Depending on the network, the role of DG Comp may vary; but overall, it plays an important role in the functioning of European competition networks.

4.1.2.1 European Competition Network

4.1.2.1.1 ORIGIN AND HISTORY

The ECN was established under Regulation 1/2003,[18] whose enactment – together with the modernisation of European competition law, including the creation of the ECN – has been described as a legal and cultural revolution.[19]

16 M. Savino, 'The Role of Transnational Committees in the European and Global Orders', *Global Jurist Advances*, vol. 6, iss. 3, 2006, p. 2.

17 K. Seidel, 'DG IV and the Origins of a Supranational Competition Policy: Establishing an Economic Constitution for Europe', in W. Kaiser, B. Leucht, M. Rasmussen (eds), *The History of the European Union: Origins of a Trans- and Supranational Policy 1950–1972*, London, Routledge, 2009, p. 131.

18 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance), OJ L 1, p. 1–25.

19 C.-D. Ehlermann, 'The Modernization of EC Antitrust Policy. A Legal and Cultural Revolution', *CMLRev,* vol. 37, iss. 3, 2000, p. 537.

Before the formal establishment of the ECN, there was a degree of cooperation among European NCAs, both between themselves and with the European Commission. Some authors even claim that an informal network of NCAs and the Commission existed under Regulation 17/62.[20] This was not as formalised as the ECN, being limited to performing the functions of an information network without specific bodies or procedures, and based on irregular contact between stakeholders. It involved only those countries whose NCAs were well developed (ie, France and Germany).[21] The creation of the ECN was linked to a profound change in European competition law and the enlargement of the European Union in 2004. One of the main tenets at the time was to decentralise the application of European competition law and to entrust NCAs with the duty to apply Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) directly. From the outset, the ECN emphasised that the network is not an EU institution and is unable to issue any decisions.[22]

The creation of the ECN was greeted with some scepticism. It was argued, for example, that the ECN would be inefficient because it relied too much on the good faith of network members and their willingness to cooperate sincerely; while domestic political considerations would tend to militate against such cooperation and competition policy would always be trumped by domestic industrial policy.[23] The ECN was set up as a static and atypical network because of its highly formalised structure; the cooperation mechanisms set out in hard law (Regulation 1/2003) and soft law (European Commission communications); and the special position of the Commission, which included the power to monitor and take command of other network members.[24] The steering role of the Commission seemed particularly controversial in this respect, as it did not foster mutual trust between network members.[25] Other transnational European networks represented different institutional arrangements based on less formal structures and relationships.[26] Interestingly in the case of the United States, the cooperation networks that involved US antitrust authorities were based on voluntary agreements developed during the evolution of those networks, and on informal structures and forms of cooperation in

20 S. Wilks, 'Understanding Competition Policy Network in Europe', p. 74.
21 D.J. Gerber, 'The Evolution of a European Competition Law Network', in C.-D. Ehlermann, I. Atanasiu (eds), *European Competition Law Annual 2002*, p. 43–48.
22 M. Monti, 'Introduction', in C.-D. Ehlermann, I. Atanasiu (eds), *European Competition Law Annual 2002*, p. 7.
23 J. Basedow, 'Who Will Protect Competition in Europe? From Central Enforcement to Authority Networks and Private Litigation', *European Business Organization Law Review*, vol. 2, iss. 3–4, 2001, p. 458.
24 Ibid, p. 664.
25 F. Cengiz, 'Multi-level Governance in Competition Policy', *ELRev*, vol. 35, iss. 5, 2010, p. 661.
26 D. Coen, M. Thatcher, 'Network Governance and Multi-Level Delegation. European Networks of Regulatory Agencies', *JPP*, vol. 28, iss. 1, 2008, p. 58.

which all authorities had the same status.[27] Nevertheless, the European Commission considered that the ECN represented a model for multi-level regulatory networks in Europe.[28]

4.1.2.1.2 LEGAL BASIS

The legal basis for the establishment and functioning of the ECN is not as unequivocal as many might assume. On the contrary, the ECN is a formal network with a rather ambiguous legal basis.[29] A closer look at Regulation 1/2003 reveals that the regulation itself does not establish a network.[30] Only Recital 15 of Regulation 1/2003 states that:

> the Commission and the competition authorities of the Member States should together form a network of public authorities applying the Community competition rules in close cooperation, … for that purpose it is necessary to set up information and consultation mechanisms, and further forms of cooperation within that network are to be determined and adjusted by the Commission in close cooperation with the Member States.

This construction may raise some doubts as to the actual legal standing of the ECN and its source. It is therefore preferable to assume that the general legal basis for the creation of the ECN is Regulation 1/2003, but that its actual functioning is based on the declarations of all members to join the network, made in accordance with the model annexed to the Commission Notice on ECN cooperation.[31] This means that the creation of the ECN was in part based on soft law.[32] At the same time, the basic rules of cooperation were laid down in hard law – that is, Regulation 1/2003; but in turn, many of them were interpreted in the abovementioned ECN Notice. In this context, European competition law is said to be an example of a hybrid legal order in which hard and soft legal rules are intertwined.[33] The ECN Notice is the basic document setting out the network's rules and interpreting the provisions of

27 F. Cengiz, 'Management of Networks between the Competition Authorities in the EC and the US. Different Polities, Different Designs', *ECJ*, vol. 3, iss. 3, 2007, p. 429.
28 See Communication from the Commission to the Parliament and the Council, Report on the Functioning of Regulation 1/2003, Brussels 24 September 2009, COM(2009) 206 final, p. 10; as well as Commission Staff Working Paper accompanying the Communication from the Commission to the Parliament and Council, Brussels, 29 April 2009, SEC(2009) 574 Final, p. 89.
29 S. Jóźwiak, *Europejska Sieć Konkurencji. Model: struktura i współpraca oraz kompetencje decyzyjne członków,* Warsaw, OCCP, 2011, p. 3.
30 S. Brammer, *Co-operation between National Competition Agencies*, pp. 111–112.
31 Commission Notice on Cooperation within the Network of Competition Authorities (2004/C 101/03), OJ C 374, 13 October 2016.
32 S. Wilks, 'Agencies, Networks, Discourses and the Trajectory of European Competition Enforcement', *ECJ*, vol. 3, iss. 2, 2007, p. 442.
33 I. Maher, 'Regulation and Modes of Governance in EC Competition Law. What's New in Enforcement?', *FILJ*, vol. 31, iss. 6, 2007, pp. 1729–1730.

Regulation 1/2003 that are relevant to the operation of the ECN. In addition, the Joint Council and Commission statements on the ECN are relevant to the operation of the network.[34]

The situation with the legal basis of the ECN changed fundamentally with the adoption of the ECN+ Directive.[35] This was the first hard law that recognised the formal existence of the ECN. There are references to the ECN in numerous provisions of the directive.[36] Article 2.1.5 even provides an official legal definition of the ECN, stating that: '"the European Competition Network" means the network of public authorities formed by the NCAs and the Commission to provide a forum for discussion and cooperation as regards the application and enforcement of Articles 101 and 102 TFEU.' The directive describes the legal nature of the ECN as 'a forum for discussion and cooperation'. It suggests that the ECN is not treated as an EU institution or any other administrative entity, but rather as a mechanism employed to facilitate the enforcement of Articles 101 and 102 TFEU through discussion and cooperation between the European Commission and EU NCAs. Unsurprisingly, the directive does not afford the ECN legal personality.[37] However, it could be claimed that the directive grants the ECN some form of imperfect administrative law personality (ie, rights or obligations may be attributed to the ECN). This is because the ECN+ Directive provides for the distinct competence of the ECN to adopt soft law instruments (Article 33.2). Although such soft laws may not be treated as a formal source of law or have any formal legal validity, they may still be regarded by stakeholders as common standards that will be followed by ECN members. The rest of the ECN's competences are limited and are of a purely administrative character, and hence actions of the network are not legally challengeable. The ECN+ Directive does not establish the ECN itself, but somehow takes the existence of the network for granted. One may assume that the legal source of the network is Regulation 1/2003; but as previously explained, this is not the case.

4.1.2.1.3 NETWORK AIMS

Three objectives have guided the establishment of the ECN:

- promoting and extending the effective implementation of European competition law and ensuring that all powers and resources of European competition authorities are used optimally;

34 Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities, http://ec.europa.eu/competition/ecn/joint_statement_en.pdf (accessed 24 July 2021).

35 Directive 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (Text with EEA relevance.) OJ L 11, [2019], pp. 3–33.

36 See Articles 1.3, 2.1.5, 4.1, 5.2, 6.1, 29.3, 33.

37 Some advocate for giving the ECN legal personality – R. Perea Molleda, 'The ECN+ Directive and the Next Steps for Independence in Competition Law Enforcement', *JECLP*, vol. 12, iss. 3, 2021, p. 176.

- ensuring uniformity in the application of European competition law; and
- developing European competition law.[38]

These objectives surrounding the creation of the ECN clearly indicate that it was primarily intended to be an administrative network and only then a harmonisation network, as the development of European competition law was considered a priority. However, it can be assumed that this development is correlated to changes in national competition laws.

There is also no shortage of criticism of the real motives behind the creation of the ECN and its effects on the European Commission. In fact, in creating the ECN, the Commission played a masterly political game, giving the impression of a major legal change resulting from the abolition of the system of notification of agreements and the creation of a decentralised system for the implementation of European competition rules, without in any way undermining its own central role in the development of European competition law and policy. Moreover, the Commission has in fact centralised the system of European competition law even further than it did under Regulation 17/62.[39] For this reason, some speak of a 'centralised decentralisation', which manifests itself in the reinforced supremacy of European competition law over national competition law (Article 3), along with the supremacy of proceedings conducted by the Commission over those conducted by NCAs (Article 16).[40] At the same time, others positively assess the *de facto* centralisation of the European competition system as resulting in increased legal certainty and greater effectiveness in preventing infringements of European competition law.[41] However pragmatic and selfish the Commission's real intentions may have been, it has succeeded in carrying out a reform whereby it has relinquished the responsibility for conducting a large number of investigations and delegated this to NCAs. The Commission has managed simultaneously to broaden its powers of influence over NCAs, while strengthening NCAs and equipping them with better conditions for cooperation within the newly established network.

4.1.2.1.4 MEMBERSHIP

The ECN is a closed network composed of all EU member states and the European Commission. The question of voluntary membership of the ECN is interesting, as some claim that this is illusory.[42] This diagnosis seems correct, as there is a paradox here. Regulation 1/2003 decentralised the implementation of

38 M. Monti, 'Introduction', p. 5.
39 A. Riley, 'EC Antitrust Modernisation. The Commission Does Very Nicely - Thank You! Part 1: Regulation 1 and the Notification Burden', *ECLR*, vol. 24, iss. 11, 2003, p. 604.
40 A.P. Komninos, 'Modernisation and Decentralisation. Retrospective and Prospective', in G. Amato, C.-D. Ehlermann, *EC Competition Law*, pp. 651 ff.
41 P. Ibáñez Colomo, *The Shaping of EU Competition Law*, Cambridge, CUP, 2018, pp. 48–49.
42 S. Wilks, 'Agencies, Networks, Discourses', p. 442.

European competition law, but it did not establish the ECN. At the same time, however, in order to fulfil the obligations imposed on EU member states by Regulation 1/2003, NCAs must sign a 'voluntary' declaration to join the network. It goes without saying that, at this point, there are no mechanisms in place for an EU NCA to leave the ECN.[43]

Non-governmental actors (NGAs) have no access to the ECN's activities and no status within its structure. Instead, the EFTA countries and the EFTA Surveillance Authority have observer status. The position of all the countries is the same; the only exception is that the European Commission has *primus inter pares*[44] status. Some have described the ECN as a structure similar to the solar system, with the Commission playing the central role of the sun.[45] The Commission finances and hosts the meetings of the ECN,[46] and has extensive powers to determine the administrative jurisdiction of members of the network (through a case allocation mechanism) and the content of their decisions (through an obligation to agree on their content). Each EU member state has the same status; and if there is more than one competition authority in a country, all authorities can act in the network, though they are treated as one voice of the member state. It is understood that national courts, even if they apply EU competition law as an authority of first instance, cannot be members of the ECN.[47]

Originally, the ECN and Regulation 1/2003 did not interfere with the internal structure of NCAs implementing EU and national competition laws. Nor did they affect procedural or sanctioning rules.[48] Despite much discussion, it was not decided to require the independence of NCAs; although at the same time, it was pointed out that the new system established by Regulation 1/2003 would promote the independence of NCAs. This was due to two reasons. First, NCAs directly apply EU competition law and are subject to the case law of the European courts in this regard. Second, national authorities have become part of the European administrative network.[49]

43 Unless – as in the case of Brexit – the member state leaves the Union, in which case its membership of the European TCNs ceases. Therefore, the UK NCA is no longer part of the ECN, even though it has never formally decided to leave the network.

44 M. Siragusa, 'The Commission's Position within the Network. The Perspective of the Legal Practitioners', in C.-D. Ehlermann, I. Atanasiu (eds), *European Competition Law Annual 2002*, p. 255.

45 D.J. Gerber, 'The Evolution of a European', p. 50.

46 One should not underestimate this financing part, as it *de facto* provides the Commission with quite a bit of influence over the ECN's functioning.

47 This is discussed in detail by S. Brammer, *Co-operation between National Competition Agencies*, pp. 130 ff.

48 J. Ortega Bernardo, 'The Administration for the Enforcement of European Competition Law', in F. Velasco Caballero, F. Pastor Merchante (eds), *The Public Administration of the Internal Market*, Groningen, Europa Law Publishing, 2015, p. 118.

49 C. Gauer, 'Does the Effectiveness of the EU Network of Competition Authorities Require a Certain Degree of Harmonisation of National Procedures and Sanctions?', in C.-D. Ehlermann, I. Atanasiu (eds), *European Competition Law Annual 2002*, p. 192.

This situation changed dramatically with the adoption of the ECN+ Directive. This new directive unequivocally obliges national governments to introduce formal independence guarantees for NCAs (Article 4) and provides them with adequate resources to carry out their tasks (Article 5). It is an interesting paradox that these obligations concern NCAs only. The European legislature is under no obligation to guarantee the formal independence of the EU competition enforcer.[50] It is more than justified to claim that the example of the European Commission proves that formal guarantees of independence are not indispensable for the effective public enforcement of competition rules. Where there is a political culture and the institutions respect each other's competence, even such a politicised body as the European Commission is capable of issuing decisions based on merits, not on politics. Moreover, there are no similar obligations that guarantee the provision of adequate resources for the Commission to enforce EU competition rules. The very existence of the ECN is vivid proof that the Commission does not have adequate resources to fully enforce the EU competition rules on its own throughout the European Union. This was true at the time when Regulation 1/2003 was adopted, as well as when the ECN+ Directive was introduced.

The issue of the independence of NCAs has been highlighted by several cases in which there was a clear political intervention resulting in the dismissal of the heads of EU NCAs, as in the examples of Greece and Poland.[51] Therefore, it should come as no great surprise that some heads of EU NCAs – including those of Germany,[52] Austria,[53] Ireland,[54] Italy[55] and Poland[56] – have advocated for the introduction of independence guarantees in the ECN+ Directive. In an important development, the General Court in *Sped-Pro*[57] for the first time identified a limit to the principle of mutual trust that underpins the close cooperation within the ECN, pointing out that in certain circumstances, an NCA may not be considered as best placed to act in view of systemic or generalised deficiencies in the rule of law in that member state, especially if the independence of a particular NCA is called into question.[58]

50 R. Perea Molleda, 'The ECN+ Directive', p. 179.
51 D. Anderson, P. Culliford, 'Current Issues in International Merger Control', *CLPD*, vol. 5 iss. 4 & vol. 6 iss. 1, 2020, p. 86.
52 A. Mundt, 'The ECN's Way Ahead. Making Decentralised Antitrust Enforcement Waterproof', *JECLP*, vol. 5, iss. 8, 2014.
53 T. Thanner, 'Strengthening the Powers of National Competition Authorities. The Austrian View', *JECLP*, vol. 7, iss. 3, 2016.
54 I. Goggin, 'Making Competition Authorities More Effective Enforcers', *JECLP*, vol. 8, iss. 9, 2017.
55 G. Pitruzzella, 'The Public Consultation on Regulation 1/2003. A Stronger Institutional Infrastructure for Fostering the EU Common Competition Culture', *JECLP*, vol. 7, iss. 1, 2016.
56 A. Jasser, 'Independence and Accountability', *JECLP*, vol. 6, iss. 2, 2015.
57 Case T-791/19, *Sped-Pro v Commission*, 9 February 2022, ECLI:EU:T:2022:67.
58 B. Van Rompuy, 'Independence as a Prerequisite for Mutual Trust between EU Competition Enforcers: Case T-791/19, Sped-Pro v Commission', *JECLP*, vol. 13, iss. 6, 2022, p. 413, DOI: 10.1093/jeclap/lpac021.

It is hard to predict what the actual impact of *Sped-Pro* will be. The General Court's assertions as to the situation in Poland may be regarded as not totally founded. For example, the General Court placed a great deal of emphasis on the possibility for the Public Prosecutor to intervene in competition cases in Poland. However, the Court seems to have ignored the fact that public interest interventions are not particular to Poland; and moreover, during the 30 years in which the Polish NCA has been operational, there have been only two (unsuccessful) interventions by the Public Prosecutor.[59] Although the reasoning of the General Court may not be totally convincing, it presents several challenges for ECN members. If the European Commission, or any other EU NCA, questions the integrity and ability of another ECN member to perform its duties as envisaged by Regulation 1/2003 and the ECN+ Directive, this will certainly affect the ECN; but it will also have implications beyond the network, as it undermines the most fundamental basis on which the network operates – trust. If a particular ECN member is regarded as not meeting rule of law standards when allocating cases within the ECN, this will adversely affect the other activities of that NCA within the network, as well as its general willingness to actively participate in the network. It may also have a spill-over effect to other areas in which the NCA is involved in cooperation, such as merger control, state aid, market surveillance or consumer protection.

Sped-Pro rightly identifies the possible occurrence of systemic or generalised deficiencies in the rule of law that may take place in a particular member state. However, should this situation arise, it should be addressed at the EU level, through the procedure provided by the EU Treaties. Obliging EU NCAs to verify the credibility of their counterparts is a sign of systemic inefficiency in the Union as a whole. As a result, political decisions are passed on to independent NCAs, which are supposed to be technocratic. The irony is that the particular NCA that is held responsible for the systemic or generalised deficiencies in the rule of law in its member state is not the national authority that has allowed these deficiencies to arise.

4.1.2.1.5 INTERNAL ORGANISATION

The ECN has a flexible structure, derived from the functions it is intended to fulfil. It has no formal internal bodies and its organisation responds to the needs of members. The ECN does not replace the European Commission in the exercise of its jurisdiction in cases with an EU dimension, but rather complements it. This results in temporary cells and forms of cooperation appearing alongside permanent ones, which may ultimately be transformed into more permanent forms. The informal structure and flexible status of the ECN represent an optimal solution for the Commission and NCAs. Therefore, the agencification[60] of the ECN has never

59 The last one took place in 2017. For details, please see M. Błachucki, 'Zaskarżanie przez prokuratora decyzji organu antymonopolowego. Glosa do postanowienia Sądu Apelacyjnego w Warszawie z 23 kwietnia 2018 r. (VII AGz 523/18)', *OSP*, iss. 12, 2019, pp. 110 ff.

60 Turning the European administrative network into an EU agency.

been seriously thematised, and the preferences of NCAs and of the Commission are largely aligned, so that the current flexible governance arrangement would appear to be a win-win solution.[61]

The ECN has a loose multi-level internal hierarchical structure, ranging from meetings of the heads of the NCAs (formally referred to as 'Directors General') to the ECN plenary meetings and the ECN working groups. The most important decision-making body of the ECN is the meeting of the heads of the NCAs. These meetings take place once a year, although they can be convened as needed by the ECN's Chairs. They are directional meetings which involve setting ECN policy and guiding the development of the network.[62] The meeting of the heads of the NCAs is thus the supreme body of the ECN, which decides on the policy objectives of the network and sets its agenda. At this level, new soft law acts are adopted; major issues of EU competition law and policy are discussed; and working group reports or new working group proposals are presented and adopted. Decisions on the establishment of working groups are also taken at this level. A wider range of issues are discussed at ECN plenary meetings. In addition to the NCA heads, senior officials responsible for cooperation within the ECN also attend. These meetings are more practical and serve to assess the administrative cooperation activities of the ECN, and to evaluate the working groups and their mandates. The plenary meetings adopt the documents prepared in the working groups, which are then considered as positions of the ECN.

The most advanced work is carried out through working groups and subgroups. These groups may be horizontal or sectoral. The ECN currently has the following horizontal working groups: Cartels; Practice & Policy; Vertical Restraints; Competition Chief Economists; Cooperation Issues & Due Process; and Forensic IT and Advocacy. It also has the following sectoral subgroups: Energy; Environment; Financial Services; Food; Pharmaceuticals; Sport; Telecoms; and Transport.[63] In addition, *ad hoc* groups may be set up or single expert meetings of EU NCAs may be organised on topical issues. Member NCAs perceive this internal structure positively. Studies have revealed that the ECN's structure allows all NCAs, regardless of size or status, to influence the network's agenda. The structure facilitates exchange at all levels, enabling NCAs to share expertise and experience with their peers.[64]

The ECN is a network in which the European Commission has the power to exercise its jurisdiction when applying European rules; although formally, the Commission does not manage the network. In many other European administrative networks, the Commission's position is formally equal to that of a national

61 M. Maggetti, Th. Vagionaki, 'How to Tame the Beast: The Diverse Development of European Networks Regulating Finance and Competition', *JEPP*, vol. 29, iss. 10, 2022, p. 1603.

62 S. Jóźwiak, *Europejska Sieć Konkurencji*, p. 5.

63 Ibid.

64 F.P. Vantaggiato, H. Kassim, K. Wright, 'Internal Network Structures as Opportunity Structures: Control and Effectiveness in the European Competition Network', *JEPP*, vol. 28, iss. 4, 2021, p. 585.

administration; but analysis reveals that its actual position is often stronger. In these networks, the Commission acts as a member with extensive knowledge and experience, and is the initiator and coordinator of many network activities.[65] The Commission also gains a privileged position by financing the activities of networks – as is the case with the ECN. In addition, within the ECN, the discretion of NCAs is significantly reduced: their responsibilities within the network are clearly set out and binding. In effect, this further strengthens the position of the Commission, which – unlike the NCAs – enjoys a wide range of discretionary powers, including the ability to exercise discretion in the allocation of cases within the network.[66] Last but not least, the Commission is seeking to strengthen its position further following the adoption of the ECN+ Directive. Although the Directive was adopted in order to strengthen exclusively the ECN and the EU NCAs, the Commission is claiming that its own powers should also be increased to the same level that NCAs now enjoy pursuant to the ECN+ Directive.[67] This adds an interesting political context to the Commission's intentions associated with the Directive.

4.1.2.1.6 FORMS OF ACTIVITY

NCAs that interact within the ECN undertake both formal and informal activities. The former relate to administrative cooperation and the adoption of soft law documents within the network forum. The latter relate to everyday contact between network members and the activities of the working groups. Unseen by outside observers, the ECN's work involves submitting enquiries to all or individual members of the network, including through various questionnaires and telephone calls. The ECN has also developed tools for the secure exchange of emails, which are managed by designated authorised disclosure officers.[68]

The ECN+ Directive has strengthened the harmonisation and administrative character of the network. Article 33.2 of the Directives states that 'the European Competition Network shall be able to develop and, where appropriate, publish best practices and recommendations on matters such as independence, resources, powers, fines and mutual assistance'. As mentioned, this provision sets out the unequivocal legal basis for the adoption of soft law documents. It points to specific areas in which such documents may be adopted. These areas concern institutional and procedural issues that are specifically covered by the new ECN+ Directive. They primarily touch upon domestic administrative arrangements and legal frameworks; and to a lesser extent, on issues that may be relevant for European antitrust rules. However, this should not be understood as preventing the ECN

65 M. Martens, 'National Regulators between Union and Governments. A Study of EU's Environmental Policy Network IMPEL', in M. Egeberg (ed), *Multilevel Union Administration. The Transformation of Executive Politics in Europe,* Basingstoke, Palgrave Macmillan, 2006, p. 136.

66 F. Cengiz, *Antitrust Federalism*, pp. 159 ff.

67 Ch. Connor, 'EU's Powers May Need "Boost" to Match ECN+, Official Says', https://globalcompetitionreview.com/ (accessed 6 July 2022).

68 S. Jóźwiak, *Europejska Sieć Konkurencji*, pp. 7–8.

from adopting guidelines on substantive issues that arise from the application of the provisions of the TFEU or Regulation 1/2003. One may speculate that the Commission prefers to keep the ECN focused on procedural and institutional issues; whereas substantive issues should be developed via soft law instruments such as notices and guidelines.

The ECN+ Directive has also enhanced the administrative nature of the ECN by introducing extensive harmonisation measures in relation to powers, fines and mutual assistance of network members. While the ECN+ Directive seeks to provide a level playing field for intensive international cooperation between ECN members, its impact is especially visible in the enhanced domestic position of ECN members. This may indeed translate into more vigorous international cooperation; but this is not necessarily inevitable. The existing data on cooperation and publicly available information suggests that ECN members do cooperate whenever necessary; there are few signs of cooperation being hindered due to a lack of appropriate legal instruments. Interestingly, the narrative memorandum accompanying the ECN+ Directive proposal did not provide practical examples of failed attempts at cooperation between ECN members due to the defective cooperation framework provided by Regulation 1/2003.

The activities of the ECN are not open to the public. Although Article 12 of Regulation 1/2003 clearly restricts access to activities connected to administrative cooperation, in practice, information about any interactions taking place within the ECN is not publicly available. This blanket restriction is somewhat questionable. In this regard, one interesting initiative aimed at increasing the transparency of the network's activities is the publication since 2013 of the *ECN Brief*[69] newsletter. This provides an opportunity to keep abreast of the ECN's activities and the most important changes taking place in member NCAs. Importantly, these outreach activities are increasing, as demonstrated by the more recent launch of a new newsletter website[70] with better indexing of information and easier access to articles. Currently, no other TCN offers an updated collection of information about itself. Even the ICN website, which is a very rich resource of documents and information, does not provide updates on its work and that of network members.

It is worth noting that the ECN has never had a formal dispute resolution mechanism;[71] and the ECN+ Directive has not changed this situation in any way. The only means of resolving disputes are informal discussions through one of the ECN meetings (Working Group or Directors General meetings). Such discussions and dispute resolution could theoretically take place in the

69 I. Breit, J. Capiau, D. Dalheimer, V. Jukneviciute, P. Krenz, E. Rikkers, A. Sinclair, 'Developments in and around European Competition Network and Cooperation in Competition Enforcement in the EU. An Update', in V. Marques de Carvalho, C.E. Joppert Ragazzo, P. Burnier da Silva (eds), *International Cooperation*, p. 53.

70 See ECN Brief, https://webgate.ec.europa.eu/multisite/ecn-brief/en/brief/editorial (accessed 24 July 2021).

71 S. Brammer, *Co-operation between National Competition Agencies*, p. 175.

Advisory Committee (AdCom) on Anti-competitive Practices and Dominant Positions.[72] The creation of the ECN was accompanied by a strengthening of the role of this Committee, but only as an advisory body to the European Commission and not as a body of the newly established network.[73] AdCom plays an advisory role in the Commission's decision-making process and provides for greater legitimacy and formal accountability of the Commission. However, AdCom's meetings are held only to discuss drafts of Commission decisions and it is the Commission itself that decides on the organisation of meetings. In particular – and despite proposals to the contrary – AdCom cannot pronounce on disputes relating to the allocation of cases or challenge Commission decisions in this regard.[74] Although the composition of AdCom is the same as that of the ECN, the Committee is not a body of the ECN, but rather an advisory body to the European Commission. It cannot be regarded as a forum for the settlement of disputes within the ECN, since its primary function is to issue opinions on draft decisions of the Commission. Moreover, the Committee's opinion is not binding, but only advisory, so any factual impact on the Commission's final decision comes only from AdCom's reputation and reasoning of the opinion. It is also worth remembering that in the event of a dispute, the Commission has the final word on jurisdictional matters and can arbitrate the disputed issue or take over the case.

4.1.2.1.7 NETWORK OUTPUT

The achievements of the ECN can be considered in terms of three aspects that correspond to the nature of this network: administration, harmonisation and information.

The extent of administration cooperation within the ECN is reflected in the available information on the number of cases and decisions notified under Regulation 1/2003 (see Table 4.2).

The statistics reveal the intensive application of Regulation 1/2003 by NCAs and their active cooperation on the basis of the Regulation. A comparison between the number of cases notified by the European Commission and by NCAs demonstrates the rationale for decentralisation. Furthermore, the figures confirm

72 F. Cengiz, *An Academic View on the Role and Powers of National Competition Authorities. Background to the ECN Plus Project*, Brussels, Directorate General for Internal Policies. Policy Department A: Economic and Scientific Policy, 2016, p. 13, https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2016)578971 (accessed 24 July 2021).

73 A. Schaub, 'The Commission's Position within the Network', in C.-D. Ehlermann, I. Atanasiu (eds), *European Competition Law Annual 2002*, pp. 241–242.

74 J. Fingelton, 'The Distribution and Attribution of Cases Among the Members of the Network. The Perspective of the Commission/NCAs' in C.-D. Ehlermann, I. Atanasiu (eds), *European Competition Law Annual 2002*, pp. 337–338.

that Regulation 1/2003 has led to a spectacular increase in the enforcement of Articles 101 and 102 TFEU.[75]

Table 4.2 Number of cases and decisions notified to the European Commission on the basis of Regulation 1/2003[76]

Year	*Total number of case investigations that the ECN was informed about**	*European Commission cases*	*NCA cases*	*Cases in which an envisaged decision was submitted by an NCA during that period ***
2004	301	101	200	32
2005	203	22	181	76
2006	165	21	144	64
2007	150	10	140	72
2008	159	10	149	60
2009	150	21	129	70
2010	169	11	158	94
2011	163	26	137	82
2012	110	6	104	85
2013	120	5	115	48
2014	196	23	173	101
2015	179	43	136	94
2016	145	18	127	77
2017	151	29	122	80
2018	165	31	134	67
2019	138	19	119	82
2020	139	13	126	84

* Case investigations commences, whether by an NCA or by the European Commission.
** Cases that reached the envisaged decision stage; only submissions from NCAs under Article 11(4) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 and 102 TFEU.

The ECN's harmonisation activities include soft law acts and other resolutions and reports prepared and adopted by the ECN. As mentioned previously, prior to the enactment of the ECN+ Directive, there was no clear legal basis for the adoption of soft law acts by the ECN. Reports have no normative character and are only informative; while recommendations have normative value as soft law. It also appears that many of the ECN's recommendations were adopted more in order to pressurise national governments into making legislative changes than simply to standardise the administrative practice of network members. To a significant extent, this political objective manifested

75 W.P.J. Wils, 'Ten Years of Regulation 1/2003-A Retrospective', *JECLP*, vol. 4, iss. 4, 2013, p. 301.
76 Source: https://ec.europa.eu/competition-policy/european-competition-network/statistics_en (accessed 24 July 2021).

itself when the ECN's recommendations served as the *de facto* legitimisation of many of the legislative proposals contained in the ECN+ Directive.

The recommendations adopted by the ECN are set out in Table 4.3.[77]

Table 4.3 ECN recommendations

ECN Model Leniency Programme (2006; revision 2012)[78]
ECN Recommendation on Investigative Powers, Enforcement Measures and Sanctions in the context of Inspections and Requests for Information
ECN Recommendation on the Power to Collect Digital Evidence, including by Forensic Means
ECN Recommendation on Assistance in Inspections conducted under Articles 22.1 of Regulation (EC) No 1/2003
ECN Recommendation on the Power to Set Priorities
ECN Recommendation on Interim Measures
ECN Recommendation on Commitment Procedures
ECN Recommendation on the Power to Impose Structural Remedies

The resolutions adopted by the ECN are set out in Table 4.4.

Table 4.4 ECN resolutions

Joint paper of the heads of the NCAs of the European Union: How national competition agencies can strengthen the DMA (23 June 2021)[79]
The reform of the Common Agricultural Policy (21 December 2012)
Protection of leniency material in the context of civil damages actions (23 May 2012)
Competition authorities in the European Union – the continued need for effective institutions (16 November 2010)
The recommendation of the High Level Group on Milk, aimed at improving the bargaining power of dairy farms (17 November 2010)[80]

77 All these recommendations are available at: ECN, Documents, https://ec.europa.eu/competition-policy/european-competition-network/documents_en (accessed 24 March 2022).

78 The ECN Model Leniency Programme used to be a document of special importance, serving as a blueprint and main normative motivation for legislative changes in member states. The ECN guidelines indicated the direction of legislative change – many provisions of the ECN+ Directive transfer the standards contained therein to the level of hard law. These include leniency, powers of investigation, decisions and sanctions, priorities and remedies.

79 German Federal Cartel Office, Digital Markets Act – Joint position of European competition authorities, https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/23_06_2021_DMA.html (accessed 24 July 2021).

80 German Federal Cartel Office, Digital Markets Act – Joint position of European competition authorities, https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/23_06_2021_DMA.html (accessed 24 July 2021).

The resolutions set out the position of the ECN on a specific issue in more or less detail (depending on the subject). They often include proposals for specific legislative or administrative action by the relevant authorities. The resolutions constitute the ECN's response to current issues of particular importance to NCAs. They serve as policy statements and represent the voice of the EU NCAs in ongoing discussions within the European Union.

Less formal and more concise are statements prepared by the ECN. Three official statements have been prepared by the network so far (see Table 4.5).[81]

Table 4.5 ECN statements

Antitrust: Joint statement by the European competition authorities on application of competition law during the Coronavirus crisis (23 March 2020)
Statement on Dutch Authority for Consumers and Markets' public consultation on sustainability guidelines (9 July 2020)
Joint statement by the European Competition Network on the application of competition law in the context of the war in Ukraine (21 March 2022).

Statements are a prompt response to current events expressing the common position of ECN members.

The reports published by the ECN are set out in Table 4.6.[82]

Table 4.6 ECN reports

General:
• Investigative Powers Report (31 October 2012)
• Decision-making Powers Report (31 October 2012)
Sectoral:
• Report on the monitoring exercise carried out in the online hotel booking sector by EU competition authorities in 2016 (6 April 2017)
• The economic impact of modern retail on choice and innovation in the EU food sector (24 May 2014)
• ECN activities in the food sector – Report on competition law enforcement and market monitoring activities by European competition authorities in the food sector (24 May 2012)
• Information paper on competition enforcement in the payments sector (20 March 2012)

Formally, ECN reports are a manifestation of the network's information activities. They are generally prepared by working groups and address selected topics of particular interest to all members of the network. The general reports provided quantitative and qualitative data that ultimately supported the rationale for the adoption of the draft ECN+ Directive.

81 All statements are available ibid.

82 All reports are available at: ECN, Documents, https://ec.europa.eu/competition-policy/european-competition-network/documents_en (accessed 24 March 2022).

The ECN's outreach activities cannot be overestimated, although it is difficult to attest to this with figures. They consist of meetings of working groups, proceedings and other events. In parallel, there is an intensive exchange of experience through enquiries relating to national legislation and administrative practice, complemented by ongoing personal, telephone and email contact. It seems that for many NCAs and their officials, participation in the network has become a routine part of their administrative practice, and contacts with other network members are not particularly different from contacts with other national administrations. Interestingly, network contacts are often more effective, resulting in greater willingness to cooperate with member NCAs than with national public administrations.

In the opinion of some EU NCAs, the ECN has been a great success, which can serve as an example for other regional associations (eg, in Asia, Africa or Latin America) in seeking to establish networks of NCAs. The primary achievement of the ECN is legal and administrative convergence.[83] The key characteristic of this convergence process is that it has often developed through soft law measures.[84] As a result of the cooperation within the ECN and the broad modelling of national law on EU rules, convergence may be seen not only in relation to formal decisions, but also in relation to guidelines and market reviews, for example.[85] Another achievement is the tremendous increase in cooperation between NCAs, in relation to which the European Commission acts primarily as host of the forum.[86]

4.1.2.1.8 FORMS AND SCOPE OF COOPERATION

The ECN is the most advanced network cooperating on the information, harmonisation and administrative levels; but this demands from members a significant commitment of effort and resources.[87] The exchange of information takes place virtually

83 A. Italianer, 'The ECN, convergence and enforcement of EU competition law: achievements and challenges', https://ec.europa.eu/competition/speeches/text/sp2013_08_en.pdf (accessed 24 March 2022). It is important to remember that convergence was developing even before the establishment of the ECN – see I. Maher, 'Alignment of Competition Laws in the EC', *YEL*, vol. 16, iss. 1, 1996, pp. 223–242. Nonetheless, the ECN has immensely accelerated the process.

84 M.C. Lucey, 'So-called "Soft Law" Attempts to Achieve Convergent Public Enforcement Tools: Identifying the Achilles' Heel of the Economic Adjustment Programmes in Ireland', *JAE*, iss. 5, 2017, pp. 152 ff.

85 I. Maher, 'The Challenge of European Competition Network Convergence in the Definition of Harm to Competition', in D. Geradin, M. Merola (eds), *The Notion of Restriction of Competition: Revisiting the Foundations of Antitrust Enforcement in Europe*, Brussels, Bruylant, 2017, pp. 106 ff.

86 B. Lasserre, 'The Future of the European Competition Network' (16 May 2014), *21st St. Gallen International Competition Law Forum ICF*, 2014, p. 2, https://ssrn.com/abstract=2567620 (accessed 24 July 2021).

87 It should not be assumed that smaller NCAs do not play a visible role in the ECN. Ultimately, this depends on the people from the NCAs involved and their individual priorities. Sometimes, representatives from less well-resourced NCAs can have a strong influence on the network in such areas if they are strongly committed to the network's

on a daily basis, which requires the appointment of one or more individuals in the office responsible for maintaining direct contact between NCAs. In practice, most communications between EU NCAs take place via the ECN Interactive electronic database, administered by the unit of DG Comp with responsibility for the ECN. This database is used for case notifications and the secure exchange of information and documents, and is accessible to all ECN members. In addition, NCA staff attend working group meetings; and senior officials also attend plenary and Directors-General meetings. Depending on the agenda of the working groups, NCA staff may be involved in the production of reports or the preparation of soft law documents. Most meetings of ECN bodies are organised in Brussels, but some working group meetings are also organised by individual NCAs.[88]

The ECN, as an administrative network, has in place a number of regulations for taking formal administrative action in the course of proceedings. Among other things, these relate to gathering information, assisting with evidence and agreeing on the content of decisions. Importantly, however, many of these obligations are voluntary, and the handling of requests and replies to questions from other authorities depends to a large extent on the will of the NCA to which they are addressed.[89] Despite this, NCAs cooperate intensively and refusals to assist are rare. This shows that the strength of the network lies in the mutual trust among NCAs and their willingness to cooperate. Trust is also key to easing any tensions relating to unilateral transnational enforcement.[90] It is enhanced by the jurisprudence of the General Court, which confirms that documents exchanged during investigations among ECN members are not accessible.[91] This allows ECN members to continue engaging in an open and constructive exchange of views, within a climate of trust.[92]

4.1.2.1.2.9 NETWORK CHARACTERISTICS: SUMMARY

The ECN is a formalised closed network with vertical elements operating within an international organisation: the European Union. It is an information, harmonisation and administrative network with a continental dimension. The ECN is neither an international nor an intergovernmental organisation. It has no legal personality and has no official seat, even though meetings tend to take place in

activities (eg, by taking up positions in working groups, taking on the role of editor of a policy paper etc).

88 S. Jóźwiak, *Europejska Sieć Konkurencji*, pp. 5 ff.

89 F. Jenny, 'Does the Effectiveness of the EU Network of Competition Authorities Depend on a Certain Degree of Homogeneity within its Membership (With Respect to Status, Structure, Powers, Responsibilities, etc.)?', in C.-D. Ehlermann, I. Atanasiu (eds), *European Competition Law Annual 2002*, pp. 206–208.

90 M. Martyniszyn, 'Competitive Harm Crossing Borders', p. 696.

91 Cases T-201/11, *Si.mobil v Commission*, 4 April 2011, OJ C 160/24, 28 May 2011 and T-355/13, *easyJet Airline v Commission*, 21 January 2015, OJ C 73/, [2015], p. 25.

92 V. Pereira, J. Capiau, A. Sinclair, 'Union de Almacenistas de Hierros de Espana v Commission: Strengthening a Climate of Trust Within the European Competition Network', *JECLP*, vol. 7, iss. 2, 2016, p. 119.

Brussels. The network is primarily a form of decentralised implementation of European law through the creation of legal mechanisms for interaction between the NCAs of EU member states.

The ECN is an example of a network that has exceeded the expectations of its creators. Initially conceived as an administrative network, it evolved quite rapidly into a harmonisation network. Although the harmonisation element is important, the ECN still allows for a considerable level of divergence among its members (especially with regard to the outcome of investigations).[93] Nonetheless, this possibility is likely to diminish over the years. Decentralisation was theoretically supposed to weaken the position of the European Commission (as it transferred part of its powers to NCAs). In fact, however, it has strengthened the role of the Commission through mechanisms aimed at ensuring uniformity in the application of European competition law.[94] The decentralisation of European competition policy and the creation of the ECN have thus strengthened the Commission's position and increased the factual independence of NCAs *vis-à-vis* national governments. However, paradoxically, EU NCAs find themselves in a situation of double subordination: on the one hand, to the supreme authorities of their national administration; and on the other, to the Commission.[95] This situation has been exacerbated by the enactment of the ECN+ Directive, which has strengthened the formal independence of the EU NCAs.

For the above reasons, the creation and functioning of the ECN have considerably strengthened the positions of the EU NCAs, which have taken full advantage of the cooperation mechanisms provided for under the ECN. Although the network itself places the main emphasis on the establishment of effective cooperation mechanisms, the harmonisation of national laws – which the ECN did not require in its original form, leaving this to the discretion of EU member states – has also been progressing.[96] The harmonisation of procedural and substantive laws should continue to accelerate following the implementation of the ECN+ Directive, which should further strengthen the harmonisation element of the network, as well as complementing the existing instruments of administrative cooperation. For the first time in the case of the ECN, the ECN+ Directive constitutes an intervention in the system and the internal organisation of the members of the network.[97]

93 Y. Svetiev, *Experimentalist Competition Law and the Regulation of Markets*, Oxford, Hart, 2020, pp. 52–53.

94 S. Wilks, 'Agency Escape. Decentralization or Dominance of the European Commission in the Modernization of Competition Policy?', *Governance*, vol. 18, iss. 3, 2005, pp. 450–452.

95 O. Stole, 'Towards a Multilevel Union Administration? The decentralization of EU Competition Policy', in M. Egeberg (ed), *Multilevel Union*, pp. 100–101.

96 E. Sakkers, 'Regional Cooperation in Antitrust Enforcement. The European Competition Network and the Main Pillars on Which It Is Built', in V. Marques de Carvalho, C.E. Joppert Ragazzo, P. Burnier da Silva (eds), *International Cooperation*, pp. 31–32.

97 For more on this aspect of change, see A. Sinclair, 'Proposal for a Directive to Empower National Competition Authorities to Be More Effective Enforcers (ECN+)', *JECLP*, vol. 8, iss. 10, 2017, pp. 31 ff.

4.1.2.2 EU Merger Working Group

4.1.2.2.1 ORIGIN AND HISTORY

Describing and analysing European networks of cooperation between NCAs in relation to merger control presents some difficulties. The literature highlights that Point 14 of the Preamble to the EUMR states that:

> the Commission and the competent authorities of the Member States should together form a network of public authorities, applying their respective competences in close cooperation, using efficient arrangements for information-sharing and consultation, with a view to ensuring that a case is dealt with by the most appropriate authority.[98]

However, it is difficult in this context to speak of a real network, understood as a separate (institutionalised) form of cooperation between NCAs. Although the term 'network' is used in the document, it seems rather that this provision has the character of a certain declaration (hence its inclusion in the preamble and not in the EUMR provisions themselves), which in practice describes the system of allocating merger cases. This is also confirmed by the lack of any reference to the 'network' mentioned in the preamble in the provisions of the EUMR or the Implementing Regulation,[99] or even the Jurisdictional Notice.[100] Therefore, neither the EUMR nor other generally applicable rules create any forum or transnational network at the EU level dedicated to cooperation in the field of merger control.

Taking the above into account, a real transnational network of cooperation of EU NCAs in merger cases emerged only in January 2010, when the EU MWG was established at the European Commission. The idea for this forum – an equivalent to the plenary of the ECN, which principally deals with antitrust issues – was initially formulated by several NCAs at a breakout session of the ECA and was later taken up by the European Commission. It started out as an *ad hoc* group, but was quickly recognised as a permanent working group. Its members were drawn from NCAs and the policy section of the European Commission.[101] The establishment of the MWG was preceded by several meetings of the merger control expert group of the ECA in 2008 and 2009. Initially, these meetings were treated as informal and impromptu; but over time they became a permanent element of the NCAs' cooperation on merger cases, as there had previously been no forum for cooperation on merger cases

98 J. Supernat, 'Koncepcja sieci organów administracji publicznej', in J. Zimmermann (ed), *Koncepcja systemu prawa administracyjnego. Zjazd Katedr Prawa Administracyjnego i Postępowania Administracyjnego. Zakopane 24–27 wrzesień 2006,* Warsaw, WK, 2007, p. 211.

99 Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ L 133, pp. 1–39.

100 Consolidated Commission Notice on jurisdictional issues under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C 95, 1[2008].

101 A. Bardong, 'The EU Merger Working Group: Looking Through the Rear View Mirror', in M. Błachucki (ed), *International Cooperation*, p. 36.

at the EU level. For this reason, the heads of the EU NCAs and the Commissioner for Competition decided to partially formalise the MWG.

The MWG operates outside the ECN structure and is formally independent from it. In practice, however, this distinction is fluid, as the MWG uses, for example, the IT infrastructure developed for ECN use. In addition, merger control issues are sometimes considered within ECN working groups. These groups are sector-specific, so that sometimes, when discussing the experience of countries in dealing with cases from a particular sector, merger control experiences and cases are necessarily presented.

Within the framework of cooperation in the field of merger control, representatives of individual EU countries also participate in the Advisory Committee on Concentrations of the European Commission. Like the Advisory Committee on Anticompetitive Practices and Dominant Positions, this Committee is not a network body, but rather an advisory body to the European Commission. Its opinion is not binding, but only advisory, and therefore the Commission can *de facto* do whatever it wants with it (even if formally the Commission is supposed to 'take [its opinion] into account to the greatest possible extent'). In practice, the role of this Advisory Committee is even less significant than that of its antitrust counterpart. In practice, it deals with draft decisions that have already been elaborated and agreed internally by all involved units within the European Commission. Any substantial change may trigger a restart of the whole process and there is simply no time for that.

4.1.2.2.2 LEGAL BASIS

There is no formal legal basis for the operation of the MWG. The network functions on the basis of an agreement between the heads of the EU NCAs and the Commissioner for Competition.[102] Each NCA has joined the network independently and voluntarily.

4.1.2.2.3 NETWORK AIMS

The purpose of cooperation within the MWG is to enhance unity, convergence and cooperation between national orders and authorities in order to ensure the effective administration and implementation of merger control. The mandate of the MWG is to identify areas for convergence of law or administrative practice in the handling of mergers with transnational effects. The MWG is the first body at the EU level dedicated exclusively to cooperation in the field of merger control. In merger control – unlike in antitrust regulation, where national provisions are equivalent to Articles 101 and 102 TFEU – certain national regimes have

102 EC, The EU Merger Working Group, https://ec.europa.eu/competition-policy/mergers/national-competition-authorities/eu-merger-working-group_en (accessed 24 July 2021). This also shows that the Commission is aware that in the case of the MWG, there is no legal basis for the existence of this network and therefore it may only have an informal character resulting from an ECA-like arrangement of NCAs.

important specificities, such as the thresholds for mandatory filing (eg, the market share threshold in Portugal and Spain) or the substantive test (dominance versus significant impediment of effective competition). Thus, the need for the existence of the MWG is even more acute.

4.1.2.2.4 MEMBERSHIP

This group consists of representatives of the European Commission and EU NCAs and, as observers, the NCAs of the EEA and the EFTA Surveillance Authority.

4.1.2.2.5 INTERNAL ORGANISATION

The structure of the MWG is quite simple and typical of informal networks. The group operates in plenary meetings held three times a year, generally in Brussels. The work of the group is organised by the Chair of the group, which is the European Commission; and the two Vice-Chairs of the group, who are representatives of the NCAs. No additional bodies exist within the group. Individual projects carried out within the group are coordinated by the designated NCAs and/or the Commission.

4.1.2.2.6 FORMS OF ACTIVITY

As an informal network, the MWG does not have the authority to make any binding arrangements. In fulfilling its mandate, the MWG primarily serves to facilitate the exchange of experience, the visible outcome of which is the preparation and publication of reports. Another of the group's objectives is to deepen the convergence of national and European laws; to this end, the MWG may prepare best practices or other soft law documents that will serve to unify administrative practice. In addition, the MWG intensively discusses any draft amendments to the EU merger control laws. The MWG, as an informal network, does not independently adopt or publish any reports or best practices; all external actions must be formally accepted at a meeting of the heads of the EU NCAs.

4.1.2.2.7 NETWORK OUTPUT

The MWG is the basic EU forum for cooperation on merger control matters. The essential functions of this network are to identify merger control issues of relevance to a number of EU countries, and to clarify problems with the application of the EUMR[103] and the other statutes of the European merger control system. The first and most important achievement of the MWG was to review the barriers to cooperation in merger control cases and prepare guidelines to help overcome them. To this end, the MWG developed best practices for cooperation between

103 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (text with EEA relevance), OJ L 24, pp. 1–22.

NCAs in relation to merger control.[104] This document sets out rules for cooperation among NCAs in multi-jurisdictional merger cases, aimed at increasing the transparency of such cooperation. The adoption of the best practices is an important milestone, but efforts both from NCAs and from undertakings are required in order to realise their full potential.[105] When analysing the best practices, one interesting issue of overlap between the MWG and the ECA becomes clear. The system set out in the best practices for the notification of mutual information in the case of multi-jurisdictional mergers was initially adopted by the ECA. Members of the MWG decided to deepen the principles and rules on cooperation originally elaborated within the ECA framework in order to mitigate the risk of incoherent assessments and conflicting outcomes, together with uncertainty for merging parties.[106]

The harmonisation aspect of the MWG's activity is evidenced by two reports prepared for the group, which were subsequently issued as a common position of the NCAs of EU member states: one on information requirements in merger applications;[107] and one on public interest systems in EU countries.[108] The reports constitute cross-sectional comparative studies of national laws and administrative practices of EU NCAs. The second report is particularly interesting, as it somehow predicted the rise of protectionist measures in the European Union, as evidenced by the adoption of Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union.[109] Inevitably, foreign direct investment screening and merger control mechanisms will influence each other. Interestingly, the indicated MWG reports do not contain harmonisation recommendations. This is important in that the members of the MWG network are aware of the existing differences in national laws and administrative practices and consider them to be more or less justified; but at the same time, these do not constitute barriers to effective cooperation in merger control matters.

104 Best Practices on Cooperation between EU National Competition Authorities in Merger Review, November 2011, https://ec.europa.eu/competition-policy/system/files/2021-06/national-competition-authorities_best_practices_merger_review_en.pdf (accessed 24 July 2021).

105 A. Bardong, 'Cooperation Between National Competition Authorities in the EU in Multijurisdictional Merger Cases – the Best Practices of the EU Merger Working Group', *JECLP*, vol. 2, iss. 3, 2012, p. 140.

106 R. Prates, R. Bayão Horta, 'Cooperation in Multijurisdictional Merger Filings', p. 170.

107 EC, Report on Merger Information Requirements, May 2016, https://ec.europa.eu/competition-policy/system/files/2021-06/merger-working-group_information-requirements_report_en.pdf (accessed 24 July 2021).

108 Public Interest Regimes in the European Union – differences and similarities in approach, Final Report of the EU Merger Working Group, September 2016, https://ec.europa.eu/competition-policy/system/files/2021-06/merger-working-group_public_interest_regimes_en.pdf (accessed 24 July 2021).

109 Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, OJ L 79I, pp. 1–14.

Much of the MWG's work concerns the exchange of information on the administrative practice of NCAs and the European Commission and the functioning of the EU merger control system, and is not available to external observers. International seminars with the participation of network members, such as that organised by Poland in 2014, become an opportunity to learn about the MWG's output.

4.1.2.2.8 FORMS AND SCOPE OF COOPERATION

Cooperation within the MWG is primarily informal. Although officially the harmonisation objective of the group dominates, in practice the exchange of experiences and information is fundamental. Acting as an informal body without a legal mandate, the MWG cannot formally adopt any documents. All documents prepared within the MWG are accepted at ECN plenary meetings. This is paradoxical because the ECN has no mandate to deal with merger cases.

The MWG fulfils several roles simultaneously, acting as:

- a forum for the development of policy and guidance on NCA cooperation;
- a platform for the exchange of experiences between NCAs;
- the 'lounge' (a safe space for discussions) of the NCA merger network;
- a platform for current issues regarding the interpretation of EU rules;
- a laboratory for new and sometimes controversial ideas;
- a space for discussions in times of conflict; and
- an incubator for building mutual trust.[110]

This is a very important aspect of the functioning of many networks, which serve as a safe space for experimentation, discussions and even confrontation. One should not ignore the risk of potential conflicts between network members.[111] However, if there is a safe space to resolve such conflicts, there are good prospects for long-term cooperation. Conflicts and discussions can thus ultimately help to build mutual trust. Resolving them at the level of a competition network can prevent escalation at a higher political level.

4.1.2.2.9 NETWORK CHARACTERISTICS: SUMMARY

The MWG is a non-formalised closed horizontal network within an international organisation: the European Union. The MWG is a continental network composed of the NCAs of EU countries and the European Commission, although the EEA countries and the EFTA Surveillance Authority are observers to its work. In contrast, the network is not open to NGAs. It is primarily an information network with a strong harmonisation and administrative component. Although the MWG operates in the shadow of the ECN, the cooperation taking place within this framework is equally important for the NCAs involved. At the same time, however, due to its

110 A. Bardong, 'The EU Merger Working Group', pp. 36 ff.
111 A. Bardong provides a very interesting insights on this subject. Ibid, pp. 42–43.

informal nature, the MWG does not have as developed and far-reaching instruments of cooperation as the ECN. That said, this is justified to a large extent by the different rules on the implementation of merger control legislation at the EU level. The character and activities of the MWG reflect the idea that soft convergence and increased cooperation are the optimal approach in the field of merger control.[112] The establishment of the MWG is also an interesting instance where the creation of a new TCN resulted from the cooperation and activities of other networks (ie, the ECN and the ECA). The framework and activities of the MWG reveal that cooperation on merger control within the European Union is underdeveloped in comparison to the ECN and cooperation in antitrust cases.

4.2 African Competition Forum

4.2.1 Origin and history

The African Competition Forum (ACF) is an informal network established in March 2011 in Nairobi, Kenya, and is composed of the NCAs of African countries and regional African economic organisations.[113] The mechanisms to set up the ACF were discussed at the African Stakeholder Workshop held in Nairobi, Kenya, in March 2010, at which it was agreed that the ACF would be run as a virtual network (like the ICN).[114] Currently, the ACF brings together NCAs of 41 of Africa's 54 countries and four regional organisations: the Southern African Development Community; the West African Economic Monetary Union; the Common Market for East and Southern Africa; and the Economic Community of West African States.[115]

4.2.2 Legal basis

The legal basis for the network is the agreement between the NCAs of African countries to establish the ACF.

4.2.3 Network aims

The ACF aims to encourage African countries to adopt and develop competition legislation, to build strong NCAs, and to help promote the implementation of

112 A. Bardong, 'Cooperation Between National Competition Authorities', p. 140.

113 Competition Commission, African Competition Forum (ACF), https://competitioncommission.mu/african-competition-forum-acf/ (accessed 24 July 2021).

114 M. Bakhoum, 'Interfacing the "Local" with the "Global": A Developing Country Perspective on "Global Competition"', *Max Planck Institute for Intellectual Property and Competition Law Research Paper,* no 13–02, 2013, p. 21.

115 African Antitrust, ACF in the spotlight: African Competition Forum promotes policy enhancements, https://africanantitrust.com/2014/11/13/acf-in-the-spotlight-african-competition-forum-promotes-policy-enhancements/ (accessed 24 July 2021). Please note that other sources suggest that the AFC has only 34 members; Competition Commission, African Competition Forum, http://www.compcom.co.za/african-competition-forum/ (accessed 24 July 2021).

laws that will strengthen domestic economies. The role of the ACF is particularly important for countries that do not yet have competition laws and are preparing to enact them. The ACF has three functional objectives:

- to encourage and assist African countries that do not have yet a competition law to adopt one;
- to help build the capacity of existing and future African NCAs – including human resources, budgets and institutional structure – through training, exchange and funding; and
- to increase awareness of the benefits of implementing competition laws among governments, the general public and stakeholders.[116]

4.2.4 Membership

The organisation is open to all African countries and regional organisations.

4.2.5 Internal organisation

Initially, a Temporary Steering Group provided the organisational framework for the ACF. The Steering Committee comprised 11 members. The network is currently led by the Chair, with the help of a small Secretariat. There are no other internal bodies or working groups. South Africa was elected as the Chair, with Mauritius as Vice Chair and Senegal as the Secretary.[117]

4.2.6 Forms of activity

The ACF is a project and meeting-oriented network. It supports the functioning and development of NCAs, and prepares reports and studies. The ACF is involved in promoting competition policy in African countries, as well as organising meetings and workshops.

4.2.7 Network output

The ACF works closely with the United Nations Convention on Trade and Development (UNCTAD), the ICN, the World Bank and Canada's International Development Research Centre (IDRC). The ACF has developed its activities through a development grant received from the IDRC.[118] Together

116 M. Bakhoum, 'Interfacing the "Local" with the "Global"', p. 21.
117 Competition Commission, Operational Structure, http://www.compcom.co.za/operational-structure/ (accessed 24 July 2021).
118 IDRC, African Competition Forum. Promoting Open and Competitive Markets, https://www.idrc.ca/en/project/african-competition-forum-promoting-open-and-competitive-markets (accessed 22 July 2020).

with UNCTAD, the ACF organised a workshop on the effectiveness of NCAs.[119]

The network's first project was to examine the state of competition law in African countries and regional organisations. This allowed the ACF to identify the needs of each country and set priorities for action. The network has published several important reports. In 2014, it published two reports on the state of competition in the cement trade and sugar trade in African countries.[120] In 2016, the ACF and the World Bank prepared a report on the development of competition in African markets.[121] In 2019, the ACF organised a Mergers Capacity Building Workshop in Gambia.[122] In 2020, the ACF published a statement on the COVID-19 pandemic.[123] The network also publishes a newsletter (two editions, so far).[124]

4.2.8 Forms and scope of cooperation

The cooperation of NCAs within the network mainly consists of participation in meetings and workshops. In addition, members take part in various training and research projects organised under the aegis of the ACF. The network is often an intermediary between external assistance organisations and the NCAs of African countries.

4.2.9 Network characteristics: summary

The ACF is an informal and open horizontal network. It is primarily an information virtual network. It is sometimes described as a 'kind of African ICN'.[125] Its activities depend to a large extent on the support of external actors, through

119 UNCTAD to present at the African Competition Forum workshop on Agency Effectiveness, http://unctad.org/en/pages/MeetingDetails.aspx?meetingid=664 (accessed 24 July 2021).

120 T. Mbongwe, B.O. Nyagol, T. Amunkete, M. Humavindu, J. Khumalo, G. Nguruse, E. Chokwe, *Understanding Competition at the Regional Level. An Assessment of Competitive Dynamics in the Cement Industry Across Botswana, Kenya, Namibia, South Africa, Tanzania and Zambia*, Draft paper for presentation at pre-ICN conference, 22 April 2014, https://web.archive.org/web/20220320055730/https://www.cak.go.ke/sites/default/files/Regional%20Cement%20Sector%20Study.pdf (accessed 11 November 2022); and B. Chisanga, J. Gathiaka, G. Nguruse, P. Onyancha, T. Vilakazi, *Competition in the Regional Sugar Sector. The Case of Kenya, South Africa, Tanzania and Zambia*, Draft paper for presentation at pre-ICN conference, 22 April 2014, https://www.cak.go.ke/sites/default/files/Regional%20Sugar%20Sector%20Study_0.pdf (accessed 11 November 2022).

121 ACF & World Bank Report. Boosting Competition in African Markets, http://www.competition.org.za/review/2016/9/7/acf-world-bank-report-boosting-competition-in-african-markets (accessed 22 July 2020).

122 Gambia Competition and Consumer Protection Commission, African Competition Forum, https://gcc.gm/african-competition-forum/ (accessed 24 July 2021).

123 ACF: COVID-19 statement, https://www.compcom.co.za/wp-content/uploads/2020/05/ACF-statement.pdf (accessed 24 July 2021).

124 Competition Authority of Kenya, ACF, https://www.cak.go.ke/acf (accessed 24 July 2021).

125 M. Bakhoum, 'Interfacing the "Local" with the "Global"', p. 22.

which programmes can be developed to support the NCAs of African countries. One particular feature of the network is that regional organisations are also participants, which increases the impact of the network but at the same time is an important constraint on development – the participating organisations reserve a harmonising and administrative role for themselves and not for the network. The ACF plays an important role in integrating African NCAs and overcoming the challenges presented by the existence of multiple African regional integration associations. The network is an informal and flexible forum for discussions, and implements various projects that are relevant to its members.

4.3 Asia-Pacific Economic Cooperation

4.3.1 Origin and history

The Asia-Pacific Economic Cooperation (APEC) was established in 1989 in Canberra, Australia, as a loose forum for cooperation among Asia-Pacific countries. APEC is primarily a multilateral economic forum that is not, and does not intend to become, an international organisation. Cooperation within APEC is based solely on political declarations; there are no state agreements within APEC. Member states commit to reducing barriers to trade and investment without requiring legally binding commitments. APEC achieves its objectives by promoting dialogue and decision-making on the basis of consensus, treating the views of all members equally.[126]

4.3.2 Legal basis

APEC's legal basis is an intergovernmental agreement signed by participating countries.

4.3.3 Network aims

APEC is the most important economic forum in Asia-Pacific. Its overarching objective is to promote sustainable economic growth and prosperity in the region. The network promotes free and open trade and investment, accelerated regional economic integration, and economic and technical cooperation.

4.3.4 Membership

APEC is open to any Asia-Pacific country that is willing to remove trade barriers and that recognises APEC's strategy. There are 21 members currently: Australia, Brunei, Canada, Indonesia, Japan, South Korea, Malaysia, New Zealand, the

126 APEC, About APEC, https://www.apec.org/about-us/about-apec (accessed 24 July 2021).

Philippines, Singapore, Thailand, the United States, China, Hong Kong, Chinese Taipei, Mexico, Papua New Guinea, Chile, Peru, Russia, and Vietnam.

4.3.5 Internal organisation

As a permanent organisation, APEC has a small Secretariat located in Singapore, headed by an executive director elected for a three-year term. The highest authority of APEC is the Annual Meeting of Heads of Government. In addition, there are meetings of ministers, sectoral ministers, senior government officials, and the APEC Economic Committee.

4.3.6 Internal organisational units committed to cooperation on competition protection

Within the APEC Economic Committee is the Competition Policy and Law Group (CPLG). The CPLG – formerly known as the Competition Policy and Deregulation Group – was established in 1996 when the work programmes of the Osaka Action Programme on Competition Policy and Deregulation were merged. In 1999, APEC member ministers endorsed the APEC Principles for Improving Competition and Regulatory Reform and approved a 'roadmap' that became the basis for further work to strengthen markets in the region. In 2008, APEC members agreed to rename the group to reflect the fact that the regulatory aspects of competition were now discussed under the Economic Committee. The CPLG meets annually. The most recent meeting was held virtually on 18 February 2022, hosted by Thailand.[127] There is a view in the literature that the CPLG formula served as a model for the creation of the ICN.[128]

4.3.7 Forms of activity

As a forum for economic cooperation, APEC encourages market discipline and works to eliminate competition distortions and to promote economic efficiency. APEC supports the development of regional competition laws and policies, examines their impact on trade and investment flows, and identifies areas for technical cooperation and capacity building among member economies.

The CPLG primarily serves as a forum for discussion. At the group's meetings, member states update each other on their competition rules and regulations, including recent cases. Competition policy challenges and efforts to promote competition are discussed. A forum for dialogue on promoting competition policy is also held to facilitate the exchange of views on issues relating to the institutions, objectives and priorities of competition policy. Strategies for the effective promotion of competition and tools developed by international forums are additionally discussed.

127 APEC, Competition Policy and Law Group, https://www.apec.org/groups/economic-committee/competition-policy-and-law-group (accessed 12 March 2022).

128 I. Maher, A. Papadopoulos, 'Competition Agency', p. 76.

4.3.8 Network output

The achievements of APEC are difficult to assess, due to its nature as a forum for dialogue. Indeed, the network's success lies not in agreeing on tough treaty provisions, but rather in recognising a common interest in working together to implement transparent and non-discriminatory strategies for the development of national markets.[129] In this context, some achievements of the network can be pointed out.

First, the CPLG has organised a number of seminars and workshops. In 2021, it hosted a workshop led by New Zealand on competition law and regulation in digital markets. This helped to develop a better understanding of the interplay between competition law, consumer protection, privacy and personal data protection when considering issues relating to digital platforms and the digital economy.[130] Second, the CPLG has launched an online database of legislation and other relevant documents relating to competition law and policy applicable in all APEC countries.[131] Third, the CPLG publishes reports and studies – 14 to date – on topics such as measures of competition development[132] and regulations on information exchange in competition matters.[133] At one point, this activity seemed to have become less important for the CPLG, as no publications were published after 2012. However, since 2019, nine new reports have been published, suggesting that the CPLG is once again engaged in analytical work. The latest report, from March 2022, explores competition law in digital markets and the regulation of the digital economy by examining approaches across APEC member economies and work underway across APEC on competition and regulatory issues arising from the digital economy.[134]

4.3.9 Forms and scope of cooperation

APEC primarily provides a forum for the exchange of views, experiences and mutual learning. Its activities include the exchange of information through a regional database. This database facilitates the sharing of new developments in law; comparative aspects of competition law; the role of the courts; the degree of autonomy granted to NCAs; methods to improve the effectiveness of monitoring

129 P.J. Lloyd, K.M. Vautier, *Promoting Competition*, p. 139.

130 APEC, Competition Policy and Law Group, https://www.apec.org/groups/economic-committee/competition-policy-and-law-group (accessed 12 March 2022).

131 APEC Competition Policy and Law Database, https://www.apeccp.org.tw/index.do (accessed 12 March 2022).

132 APEC, Measures of Competition Development in APEC. Final Report, Moscow 2012, https://www.apec.org/Publications/2012/12/Measures-of-Competition-Development-in-APEC (accessed 24 July 2021).

133 APEC, Survey of Information Exchange on Competition in APEC Region. Phase I, November 2012, https://www.apec.org/Publications/2012/11/Survey-of-Information-Exchange-on-Competition-in-APEC-Region-Phase-I (accessed 24 July 2021).

134 APEC, Competition Law and Regulation in Digital Markets, https://www.apec.org/publications/2022/03/competition-law-and-regulation-in-digital-markets (accessed 12 March 2022).

and enforcement; and appropriate remedies. By organising meetings, APEC also provides a forum for the analysis of legal and regulatory issues by members.

APEC also works with other networks and international organisations. For example, the group is working with the Organisation for Economic Co-operation and Development (OECD) to develop an APEC-OECD framework for competition assessments, which will include a competition assessment checklist. Vietnam is working on the first project with the OECD on behalf of APEC.[135]

4.3.10 Network characteristics: summary

APEC is an informal horizontal information network. The CPLG is a network closed to APEC members. It is primarily a forum for deliberation. After a period of stagnation, the CPLG has reinvigorated its analytical output. The network closely follows hot topics in contemporary competition policy. In 2022, the agenda of the CPLG included issues such as the development of legal instruments to assist with the economic recovery from the COVID-19 pandemic; digital transformation and trade competition; and competition policy and sustainable development.[136] At the same time, the network cooperates with other networks – in particular the OECD.

4.4 Other continental and sub-global networks

To complete the picture of networks of a continental or sub-global nature, those based on cultural and linguistic or geopolitical ties should also be mentioned. Although these links may have little to do with competition law and policy, by virtue of their permanence and directional commitment of resources, they provide important impetus for the development of international cooperation in this area.

The Lusophone Competition Network was created in 2004 with the adoption of the Rio Declaration and brings together the NCAs of Portuguese-speaking countries.[137] The network is spearheaded by the Portuguese NCA. The network aims to promote technical assistance and cooperation between the NCAs belonging to the network.[138] The creation of the network was accompanied by the adoption of the Rio Declaration, which seeks to encourage states to create competition-friendly economic policy frameworks and introduce competition laws.[139] The network is virtual and informal in nature. The Portuguese NCA has signed a Memorandum of Understanding with UNCTAD in which it has organised meetings

135 APEC, Competition Policy and Law Group, https://www.apec.org/Groups/Economic-Committee/Competition-Policy-and-Law-Group (accessed 24 July 2021).
136 Ibid.
137 These are Angola, Brazil, Cape Verde, Guinea-Bissau, Mozambique, Portugal, São Tome and Príncipe and Timor-Leste.
138 N. Cunha Rodrigues, 'A cooperação internacional o âmbito das políticas de concorrência dos PALOP', *C&R*, iss. 46–47, 2021, p. 29.
139 Declaração do Rio De Janeiro, https://www.concorrencia.pt/sites/default/files/2021-06/Declarac%CC%A7a%CC%83o%20do%20Rio%20de%20Janeiro.pdf (accessed 24 March 2022).

for the Lusophone Competition Network countries.[140] Publicly available information shows that there have been seven annual meetings of network members – in 2004 (Brazil) and 2006 (Portugal), and more recently five other ones in parallel with the ICN's Conferences.[141] Cooperation within the network has resulted in two agreements between the Portuguese NCA on technical cooperation with the Brazilian NCA (2005); with the Mozambique National Directorate for Commerce (in 2010, before the establishment of the Mozambican NCA in 2013 (operational from 2021)); and with Angola's regulatory authority for competition (established in 2019).[142] Publicly available information on the activities of the network suggests that there was a hiatus in the functioning of the network between 2007 and 2016, during which no meetings were held. However, since 2017 there has been a visible revival of its activities.[143] The Lusophone Competition Network should be viewed within the broader framework of the Community of Portuguese Language Countries (CPLP).[144] The CPLP was created in Lisbon in 1996. Its bylaws, as amended in 2007, provide for formalised cooperation in economic fields, while promoting the development of member states (which are treated on a level playing field). Its bodies are: the Conference of Heads of State and Government; the Council of Ministers (of foreign affairs); the Permanent Steering Committee; and the Executive Secretariat (which is based in Lisbon).[145] Another more practical reason for the development of the Lusophone Competition Network may be that many companies operate in all CPLP states. It also seems that the Portuguese NCA was particularly keen to maintain relations with the NCAs of Portuguese-speaking countries, as evidenced by its abandonment of multilateral meetings to focus on bilateral technical cooperation agreements.

Another network based on cultural and linguistic ties is the Ibero-American Competition Network, created on the basis of the Ibero-American Competition Forum established in 2002 in Madrid. This network was established to exchange experiences and enhance cooperation between NCAs. However, there is currently no up-to-date information on its activities.[146]

140 Memorandum of Cooperation, https://www.concorrencia.pt/sites/default/files/2021-06/Memorando%20de%20Entendimento%20AdC%20e%20UNCTAD.pdf (accessed 24 March 2022).

141 See at Portuguese Competition Authority, Lusophone Competition Network, https://www.concorrencia.pt/pt/rede-lusofona-da-concorrencia (accessed 24 March 2022).

142 I. Maher, A. Papadopoulos, 'Competition Agency', p. 80.

143 Portuguese Competition Authority, Lusophone Competition Network, https://www.concorrencia.pt/en/international-activity/lusophone-competition-network (accessed 24 March 2022).

144 Declarações do Presidente da República Democrática de Timor-Leste na visita à Sede da CPLP, https://www.cplp.org/Default.aspx?AreaID=22 (accessed 24 March 2022).

145 Estatutos da Comunidade dos Países de Língua Portuguesa (com revisões de São Tomé/2001, Brasília/2002, Luanda/2005, Bissau/2006 e Lisboa/2007), http://www.cplp.org/Files/Filer/Documentos%20Essenciais/Estatutos_CPLP_REVLIS07.pdf (accessed 24 March 2022).

146 See Portuguese Competition Authority, Ibero-American Competition Network (RIAC), http://www.concorrencia.pt/vEN/Sistemas_da_Concorrencia/Internationa

An interesting example of a geopolitically motivated network which is based on cultural ties is the Euro-Mediterranean Competition Forum (EMCF). The EMCF was established in Rabat (Morocco) in November 2012 as an informal network of NCAs from Austria, France, Egypt, Malta, Morocco, Qatar, Tunisia and Turkey. Its founding meeting was also attended by representatives of the European Commission, UNCTAD and NGAs. The EMCF is open to all countries from Europe and the Mediterranean region, as well as international organisations and NGAs. Its primary objective is to develop cooperation on competition matters in the Mediterranean region. The network is headed by a Coordinating Committee, which includes as Co-chairs, representatives of the NCAs of Austria and Morocco; and as a member, a representative of UNCTAD. The EMCF has organised three meetings on general and policy issues (Vienna, December 2011; Doha, April 2012; Geneva, July 2012). Its achievements include the organisation of four workshops, on promoting competition policy and law (Geneva 2013);[147] the relationship between NCAs and sector regulators (Tunis 2013);[148] the independence and accountability of NCAs (Geneva 2014);[149] and the future of the EMCF (Malta 2016).[150] The main initiator of the network, the Austrian NCA, intended to formalise the network and transform it into a more advanced networked cooperation platform.[151] The basis for this was supposed to be established at the last meeting in Malta, but details on its results are not publicly available. Also, there is currently no up-to-date information on the activities of the network.[152]

4.5 Concluding remarks

Continental competition networks usually facilitate the most advanced forms of cooperation of NCAs. This is especially true of those networks that operate within advanced continental union-like organisations, of which the most obvious example is the European Union. The preference is for continental NCAs with close legal or economic ties, as this clearly facilitates their collaboration. Traditionally close

l_Competition_System/Ibero-American_Competition_Network/Pages/Ibero-American_Competition_Network.aspx (accessed 24 July 2021).

147 UNCTAD, First Workshop of the Euro-Mediterranean Competition Forum (EMCF). Competition Advocacy in the Euro-Mediterranean Region, http://unctad.org/en/pages/MeetingDetails.aspx?meetingid=348 (accessed 24 July 2021).

148 Ibid.

149 UNCTAD, Third Workshop of the Euro-Mediterranean Competition Forum (EMCF). Independence and Accountability of Competition Authorities, http://unctad.org/en/pages/MeetingDetails.aspx?meetingid=575 (accessed 24 July 2021).

150 UNCTAD, Fourth Workshop of the Euro-Mediterranean Competition Forum (EMCF), http://unctad.org/en/pages/MeetingDetails.aspx?meetingid=1020 (accessed 24 July 2021).

151 N. Harsdorf, B. Seelos, 'Competition Law and Policy in Austria. The Merits of International Cooperation for Young Competition Agencies at the Example of Austria', in V. Marques de Carvalho, C.E. Joppert Ragazzo, P. Burnier da Silva (eds), *International Cooperation*, p. 77.

152 Austrian Federal Competition Authority, International cooperation, https://www.bwb.gv.at/en/international_cooperation (accessed 24 July 2021).

neighbourly and regional relationships also influence the preferred frameworks to operate within and the partners to work with. Finally, TCNs do not function in a political vacuum and their development is a function of continental integration. They are often used by continental integration organisations to facilitate the integration process. For such organisations, TCNs offer the opportunity to achieve this goal of integration without integrating national structures or establishing transnational institutions. At the same time, Europe is an excellent example how different competition networks may coexist. Although those networks serve different purposes and have different legal bases, their members are the same NCAs. A comparison between the ECN and the EU MWG reveals that cooperation on merger control is much less developed and is based primarily on informal cooperation (the ECA notification system). Paradoxically, it reveals that network structure is very flexible and may be used in different ways and by distinct organisations. The European example confirms that the same group of NCAs are cooperating with each other through different fora. This patchwork of networks stems from the diverse needs of NCAs and national barriers to full integration. These networks are truly complementary, which is why this patchwork structure has been a success overall.

The European example may serve as an accurate counterpoint when assessing other continental competition networks. It is clear that far-reaching European integration has translated into well-developed cooperation among EU NCAs. Additionally, European TCNs play the role of broker between EU and domestic administrations.[153] It remains an open question whether such advanced continental integration could arise elsewhere and whether other continental networks could fully follow the path of European TCNs. Other continental networks facilitate cooperation to such extent as the particular organisation allows. Further, when analysing non-European competition networks, the heterogony of members is clearly evident. This heterogony is perhaps one of the main obstacles to more advanced international cooperation of NCAs; although the example of the ICN suggests that this is not always the case. Despite all these challenges, the use of network structures by various regional integration organisations proves that they are a viable option for promoting cooperation among NCAs and strengthening the process of regional integration.

153 K. Yesilkagit, J. Jordana, 'Entangled Agencies and Embedded Preferences: National Regulatory Agencies in Multi-Level European Governance', *JEPP*, vol. 29, iss. 10, 2022, p. 1678.

5 Regional competition networks

Regional competition networks present the broadest spectrum of solutions, offering members the greatest opportunities to shape cooperation as they wish. A distinction is made between networks based on binding international agreements, which form the basis of administrative networks; and networks based on informal agreements between national competition authorities (NCAs), which form the basis of information networks. At the same time, the ephemerality of many regional networks cannot be overlooked. The ease of setting up informal transnational competition networks (TCNs) is matched by their equally swift disappearance – the latter situation most often not involving an official end of the network's activity, but rather resulting from the cessation of cooperation within the network. Regional cooperation among NCAs may not be fostered through the development of bilateral cooperation, which in certain situations may provide an alternative to multilateral cooperation within TCNs. As indicated at the start of this book, the analysis is limited to the most important networks – particularly in the case of non-European regional competition networks. Regional networks pose a particular research challenge, as they often have a rather ephemeral aspect and there can be significant difficulties in identifying them and collecting data from public sources, which is particularly evident in the case of networks from South America and Africa. As a result, this chapter offers a subjective selection of regional networks conducted according to the criteria of their relevance to the region and their specific features.

5.1 Europe

5.1.1 Nordic Cooperation

5.1.1.1 Origin and history

The tradition of Nordic cooperation goes far beyond signed international agreements and has lasted for nearly 60 years.[1] The Nordic countries are linked by

1 See Finnish Competition and Consumer Authority, International Cooperation, https://www.kkv.fi/en/competition-affairs/international-cooperation/ (accessed 24 March 2022).

DOI: 10.4324/9781003376002-5

traditional cultural, economic and political ties, which translate into extensive cooperation in many areas of life. The situation is no different when it comes to competition law. The formally established Nordic Cooperation serves this purpose. It was established by Denmark, Iceland and Norway[2] on 16 March 2001, on the basis of an international agreement. Greenland, the Faroe Islands and Sweden subsequently signed the agreement;[3] with Finland also cooperating under the agreement, despite not formally being a party thereto. The 2001 Nordic Agreement provided for information exchange in antitrust and merger cases, but lacked further tools for cooperation. In particular, the possibility to provide assistance with investigative measures would have improved the examination of cases with cross-border effects in the Nordic region. This led to the signing of a new agreement in 2017.[4] This document strengthened the Nordic Cooperation by designing more far-reaching cooperation measures than those envisaged, for example, within the European Competition Network (ECN).

Nordic cooperation is part of the traditionally close relations among the Nordic countries which have formally developed in the public administration forum since 1956.[5] This cooperation often uses soft law instruments (conferences and other unofficial forms). When Norway and Iceland did not join the European Union, the Nordic Cooperation was formalised, resulting in an official international agreement on cooperation in competition matters. This has allowed for increased harmonisation of Nordic competition law and increased administrative cooperation in competition matters. The new official forms of cooperation have not replaced but rather complement the developed unofficial forms, which remain a very important element of the Nordic Cooperation.[6]

5.1.1.2 Legal basis

The legal basis is provided for in the Agreement on Cooperation in Competition Cases, signed in Helsinki on 8 September 2017.[7] The parties are all existing parties to the previous agreement of 2001, plus Finland. The

2 Agreement on Cooperation in Competition Cases, https://www.konkurrensverket.se/globalassets/dokument/engelska-dokument/nordic-agreement-on-cooperation-in-competition-cases.pdf (accessed 24 March 2022).

3 Agreement on Cooperation in Competition Cases, https://www.en.kfst.dk/media/53534/20181220-nordic-competition-agreement.pdf (accessed 24 March 2022).

4 M. Taurula, 'Background and Benefits of the Cooperation Agreement Between the Nordic Competition Authorities', in M. Błachucki (ed), *International Cooperation*, p. 201, DOI: 10.5281/zenodo.4211551.

5 Even before this, the Nordic Council was established in 1952 as the official body for formal inter-parliamentary cooperation. Nordic Cooperation, The Nordic Council, https://www.norden.org/en/nordic-council (accessed 24 March 2022).

6 P. Lægreid, O.Ch. Stenby, 'Europeanization and Transnational Networks', p. 19.

7 Agreement on Cooperation in Competition Cases, 8 September 2017 (2017 Helsinki Agreement), https://arkisto.kkv.fi/en/facts-and-advice/competition-affairs/international-cooperation-related-to-competition-affairs/nordic/agreement-on-cooperation-in-competition-cases/ (accessed 24 March 2022).

agreement entered into force in July 2020 after completion of the ratification process in all contracting states.[8]

5.1.1.3 Network aims

The Nordic Cooperation stems from an international agreement and has a far-reaching scope of application, encroaching on the administrative jurisdiction of the national competition authorities (NCAs). It enables the Nordic countries to exchange confidential information on mergers, cartels and abuse of dominance. According to the Helsinki Agreement, the Nordic Cooperation was established to strengthen and formalise cooperation among the Nordic NCAs and ensure the effective implementation of national competition laws. To achieve this, the countries participating in the network undertook to minimise direct or indirect obstacles to effective enforcement cooperation between NCAs. NCAs must inform each other if an investigation or proceedings by them may affect important interests of the other country.[9] Where two or more NCAs are conducting proceedings against the same or related anti-competitive practices or concentrations, they should seek to coordinate their proceedings insofar as they believe such cooperation would be in their countries' interests. In addition, as far as possible, NCAs should provide each other with information that would be useful to proceedings being conducted by other authorities. Importantly, regardless of whether NCAs are investigating the same case, they should provide legal assistance to each other according to their capacities and priorities.[10] This possibility is exceptional for TCNs, which usually require parallel investigations as a prerequisite for the exchange of evidence and the provision of assistance.

5.1.1.4 Membership

The network is closed by nature, limited to the states that are party to the agreement and the implementing NCAs. All members of the Nordic Cooperation have equal status. Any country can leave the network with 60 days' notice.

5.1.1.5 Internal organisation

The Nordic Cooperation has no permanent bodies. Its activities are manifested in annual meetings organised in successive Nordic countries. Each meeting usually covers three to four main topics, chosen jointly by the NCAs. In addition, the

8 All the Nordic countries have now joined the Agreement on Cooperation in Competition Cases; Finnish Competition and Consumer Authority,All Nordic Countries have Now Joined the Agreement on Cooperation in Competition Cases, http://web.archive.org/web/20210913103814/https://www.kkv.fi/en/current-issues/press-releases/2020/9.9.2020-kaikki-pohjoismaat-liittyneet-kilpailuviranomaisten-yhteistyosopimukseen/ (accessed 29 July 2023).

9 Article 6 of the 2017 Helsinki Agreement.

10 Article 3 of the 2017 Helsinki Agreement.

heads of the NCAs meet together to plan and coordinate cooperation among their authorities. The Nordic Cooperation may also have working groups. There are currently four: Concentrations; Legal; Economic; and Cartels.[11] There are numerous *ad hoc* expert meetings covering a wide range of issues that may be arranged when needed. For instance, the authorities' communication departments and forensic IT specialists recently met each other and learned from each other's experiences.[12]

5.1.1.6 Forms of activity

The Nordic Cooperation includes both soft and hard cooperation. Under soft cooperation, annual meetings are organised among the heads of the NCAs from the countries involved, as well as meetings between other representatives of the authorities. These meetings involve the exchange of experience and mutual improvement of qualifications. In addition, attention should be drawn to the network's intensive analytical cooperation, under which joint reports on current competition policy issues have been produced since 1998.[13]

Under the Nordic Cooperation, the most important form of hard cooperation is administrative cooperation. This includes the mutual notification of ongoing proceedings and the exchange of information and evidence, including legally protected information. This exchange of sensitive information has taken place in practice.[14] It is also possible to provide legal assistance by sending requests for information to undertakings on behalf of the requesting authority. Last but not least, the Nordic Cooperation allows for inspections to be carried out on behalf of and for the account of the requesting authority. Administrative cooperation is not conditional on there being a cross-border element to the case; it can take place in cases with a purely national dimension. Only in relation to searches is cooperation limited to competition restrictive practices. Finnish law provides for the possibility to conduct searches in merger control cases, as well.[15] An important element of administrative cooperation is the obligation, when initiating proceedings and issuing decisions, to take into account the impact that they may have on other states parties to the Nordic Cooperation.

5.1.1.7 Network output

The achievements of the network are difficult to assess because they largely involve administrative cooperation. There is no publicly available information on its

11 Finnish Competition and Consumer Authority, Nordic Cooperation, https://arkisto.kkv.fi/en/facts-and-advice/competition-affairs/international-cooperation-related-to-competition-affairs/nordic/ (accessed 24 March 2022).
12 M. Taurula, 'Background and Benefits', p. 199.
13 See Nordic Reports at: https://konkurransetilsynet.no/category/nordic-reports (accessed 24 March 2022).
14 M. Martyniszyn, 'Inter-Agency Evidence Sharing in Competition Law Enforcement', *IJEP*, vol. 19, iss. 1, 2015, p. 24.
15 M. Taurula, 'Background and Benefits', p. 206.

intensity and actual scope. On the other hand, the achievements of the network are visible to external observers, especially in terms of analytical activities and the publication of joint reports by network members. These have covered, for example, competition in civil aviation (2002); competition on the Nordic electricity market (2003); competition in telecommunications (2004); competition on the Nordic food markets (2005); competition on the Nordic banking services market (2006); the ability to compete on the Nordic electricity market (2007); challenges to the pharmaceutical and pharmacy industry (2008); and competition policy and the financial crisis (2009).[16] The last two joint reports examined the vision for competition law and policy in the coming decade (2013);[17] and competition in the waste management sector (2016).[18] The most recent common position (2019) was presented in order to support a strict merger control regime against a Franco-German proposal to include industrial policy considerations in EU merger control rules.[19]

5.1.1.8 Forms and scope of cooperation

The Nordic Cooperation bodies present the widest scope for administrative cooperation, which does not involve common structures but is rather based on the independence and separation of the members of the network. The administrative cooperation covers all cases that fall within the scope of competition protection.[20] This scope of cooperation is a full implementation of the 2014 Organisation for Economic Co-operation and Development (OECD) Recommendation.[21] The Nordic Cooperation provides broader opportunities for cooperation than the European rules because it is not limited to restrictive practices, but can also cover merger control cases (with the exception of searches). Furthermore, it can apply to cases with a national dimension.[22]

16 Available on the Norwegian Competition Authority's website: Reports, http://www.konkurransetilsynet.no/en/publications/Reports/ (accessed 1 March 2017).
17 Finnish Competition and Consumer Authority, A Vision for Competition – Competition Policy towards 2020, https://www.kkv.fi/globalassets/kkv-suomi/julkaisut/pm-yhteisraportit/nordic-report_a-vision-for-competition.pdf (accessed 24 July 2021).
18 Finnish Competition and Consumer Authority, Competition in the Waste Management Sector – Preparing for a Circular Economy, https://www.kkv.fi/globalassets/kkv-suomi/julkaisut/pm-yhteisraportit/nordic-report-2016-waste-management-sector.pdf (http://www.konkurransetilsynet.no/en/publications/Reports/) (accessed 22 July 2020).
19 Danish Competition and Consumer Authority, The Nordic Competition Authorities Support a Strict Merger Control Regime, https://www.en.kfst.dk/nyheder/kfst/english/news/2019/201906278-the-nordic-competition-authorities-support-a-strict-merger-control-regime/ (accessed 24 July 2021).
20 In contrast, it does not cover other matters within the jurisdiction of the Nordic NCAs, such as public procurement or certain regulatory powers.
21 Recommendation of the OECD Council concerning International Co-operation on Competition Investigations and Proceedings, 16 September 2014, https://www.oecd.org/daf/competition/international-coop-competition-2014-recommendation.htm (accessed 8 April 2021).
22 M. Taurula, 'Background and Benefits', pp. 203 ff.

Cooperation in the organisation of meetings and the preparation of joint documents is not particularly distinctive, though its sustainability should be stressed, as this is rare.

5.1.1.9 Network characteristics: summary

The Nordic Cooperation is a formal, closed, horizontal network. It is a network of a mainly administrative nature. It includes full administrative cooperation, consisting of mutual administrative assistance in the conduct of concentration proceedings, including the exchange of information and evidence. This cooperation also influences the initiation of proceedings and the issue of decisions. An important element of the network is the information component, which includes frequent and regular meetings and the publication of joint reports. The Nordic Cooperation has evidently not collapsed with greater integration of the Nordic countries into the European Union, but is still an efficient element of the Nordic countries' administrative systems.[23]

5.1.2 Marchfeld Competition Forum

5.1.2.1 Origin and history

The Marchfeld Competition Forum (MCF) was established on 1 July 2008 as a forum for cooperation between Central and Eastern European countries.[24] It was established at Schloss Hof palace in Austria. The main initiators of the establishment of this network were Austria and the Czech Republic. The main goal of the MCF is to strengthen cooperation among NCAs from the countries in this region of Europe.[25]

The network brings together representatives of the NCAs from Austria, Bulgaria, Croatia, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Romania, Slovakia and Switzerland; and the European Commission (Directorate General for Competition). Despite information that may be found on the websites of some NCAs (eg, the Czech NCA),[26] Poland has never been a member of the MCF.[27]

23 P. Lægreid, L.H. Rykkja, 'Nordic Administrative Collaboration: Scope, Predictors and Effects on Policy Design and Administrative Reform Measures', *Politics and Governance*, vol. 8, iss. 4, 2020, p. 360.

24 A. Lukaschek, 'Marchfeld Competition Forum', *OZK*, iss. 4, 2008, p. 148.

25 N. Harsdorf, B. Seelos, 'Competition Law and Policy in Austria. The Merits of International Cooperation for Young Competition Agencies at the Example of Austria', in V. Marques de Carvalho, C.E. Joppert Ragazzo, P. Burnier da Silva (eds), *International Cooperation,* p. 77.

26 Common Position of the Marchfeld Competition Forum on the Role of Competition Policy and Enforcement in Times of Economic Crisis, https://www.uohs.cz/download/Sekce_HS/Guidelines/CommonPosition_MCF.doc (accessed 24 July 2021).

27 According to information obtained from the Polish NCA, it has never been a member of the MCF or involved in its work.

5.1.2.2 Legal basis

The legal basis for the action is a memorandum of understanding – the Marchfeld Declaration – signed by the participating heads of the NCAs.[28]

5.1.2.3 Network aims

According to the Marchfeld Declaration, the network aims to strengthen cooperation and coordination between the NCAs of EU and non-EU countries, in particular relating to cross-border cases.

5.1.2.4 Membership

The MCF is an open network and any interested European country can join.

5.1.2.5 Internal organisation

The network has no internal organisation. There are no permanent bodies and no permanent conferences or meetings.

5.1.2.6 Forms of activity

According to the Marchfeld Declaration, the network is supposed to organise meeting and to establish working groups or organise educational events for officials. However, there is no publicly available information on whether such meetings have actually taken place or whether any working groups have been established. However, the MCF has created a database for the exchange of information on multi-jurisdictional concentrations being considered by individual NCAs.[29] This constituted a starting point for the coordination of activities and real and permanent mechanisms of cooperation to which the Marchfeld Declaration referred.

5.1.2.7 Network output

It is debatable whether the MCF has developed any lasting legacy. In a way, it has mainly involved officials of the NCAs of member countries exchanging experiences and getting to know each other. The MCF has agreed on one document on the role of competition law in times of economic crisis[30] (although this is available only on the website of the Czech NCA). The most interesting outcome of the

28 Marchfeld Declaration (Memorandum of Understanding), https://www.bwb.gv.at/fileadmin/user_upload/PDFs/MemorandumofUnderstanding.pdf (accessed 24 July 2021).
29 A. Lukaschek, 'Marchfeld Competition Forum', p. 148.
30 Czech Office for the Protection of Competition, Common Position of the Marchfeld Competition Forum on the Role of Competition Policy and Enforcement in Times of Economic Crisis, https://www.uohs.cz/download/Sekce_HS/Guidelines/CommonPosition_MCF.doc (accessed 24 July 2021).

MCF seems to be the database for the exchange of information on multi-jurisdictional concentrations; but this has only existed for a few years and is now no longer operational.

5.1.2.8 Forms and scope of cooperation

The members of the MCF have cooperated within the framework of this network, notably by organising joint seminars. In addition, one joint policy and programming document has been adopted. Administrative cooperation has concerned the maintenance of a database of notified multi-jurisdictional concentrations.

5.1.2.9 Network characteristics: summary

The MCF is (was?) an open horizontal network of an informational and partly administrative nature. The network was the brainchild of the Austrian NCA, which sought to play a leading role in promoting cooperation between the NCAs of Central and Eastern Europe. However, this policy failed – the most glaring example being the practical cessation of the MCF's activities (although the network itself has never formally been dissolved).

5.1.3 Central European Competition Initiative

5.1.3.1 Origin and history

The Central European Competition Initiative (CECI) is a network established at the initiative of the Polish NCA. It was set up on 3 April 2003 by the Polish NCA and representatives of four NCAs of Central European countries: the Czech Republic, Slovakia, Slovenia and Hungary. In 2008, Austria became the sixth member of CECI.[31]

5.1.3.2 Legal basis

CECI is based on an agreement concluded by participating NCAs.

5.1.3.3 Network aims

CECI relies on soft cooperation – mainly through political talks and exchanges of experience or the joint organisation of training, seminars and conferences.[32]

31 Office of Competition and Consumer Protection (OCCP), Foreign Cooperation/ Competition Protection, https://www.uokik.gov.pl/competition_protection32.php (accessed 24 July 2021).

32 OCCP, CECI, http://uokik.gov.pl/pl/wspolpraca_miedzynarodowa/wspolpraca_wielostronna/ceci/ (accessed 24 July 2021).

5.1.3.4 Membership

CECI is a network that is essentially open, but is focused on countries in Central and Eastern Europe.

5.1.3.5 Internal organisation

CECI has no internal organisation. There are no permanent bodies and no permanent conferences or meetings.

5.1.3.6 Forms of activity

Apart from the first meeting of the presidents of the NCAs, virtually all activities within CECI have concerned the organisation of seminars on topical and specialised issues in competition law. According to publicly available information, these meetings have been organised only by Hungary and Poland. Initially, Hungary was particularly active, organising at least five seminars between 2003 and 2007 under the OCED Regional Centre. The first seminar took place on 27 June 2003 in Budapest and concerned competition proceedings against agreements concluded by various professional groups and the development of their own codes of practice. Subsequent seminars dealt with topics such as buyer power, regional energy markets and the formulation of conditions in merger cases.[33]

5.1.3.7 Network output

It is difficult to say whether CECI has produced any lasting output. The exchange of experiences and meetings of officials of NCAs of the CECI countries are in fact the only output of the network.

5.1.3.8 Forms and scope of cooperation

The members of CECI have cooperated within this network, but only by organising joint seminars. There is no information about other forms of cooperation.

5.1.3.9 Network characteristics: summary

CECI is (was?) an informal and virtual horizontal network. It is an information network. It conducted its primary functions before Poland's accession to the European Union and during the first period of membership. At that time, it served largely as a beneficiary of EU pre-accession financial support. With the benefit of hindsight, it is clear that the achievements of CECI are mainly marked by its untapped potential and the lack of lasting effects of this cooperation. A certain paradox of the activities of the

33 See the Centre's activity reports: Annual Reports, http://www.oecdgvh.org/contents/about/annual-reports (accessed 24 July 2021).

Polish and other NCAs within CECI is that although the countries are close to each other geographically, in reality they remain strangers to each other. This contrasts, for example, with the permanent cooperation between the north-eastern Baltic states.[34]

5.1.4 Interstate Council for Anti-monopoly Policy

5.1.4.1 Origin and history

The Interstate Council for Anti-monopoly Policy (ICAP) was established on 23 December 1993 as a forum for cooperation in the field of anti-monopoly policy of the former Soviet Union states that now form the Commonwealth of Independent States (CIS). The network brings together representatives of NCAs from Azerbaijan, Armenia, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Uzbekistan and Ukraine. In 2008, Georgia left the ranks of the CIS and ICAP. The NCAs of Ukraine and Uzbekistan, although their countries did not formally leave the CIS, also ceased to cooperate through ICAP.[35] The Competition Council of Moldova, on the other hand, despite a significant reduction in its involvement in the work of the CIS in recent years, still cooperates through ICAP; but, as it points out, it promotes EU competition policy there.[36]

5.1.4.2 Legal basis

The legal basis for the creation of ICAP was the CIS Executive Treaty on Coordinated Antitrust Policy, signed in Ashgabat on 23 December 1993. This was replaced by the new Executive Treaty on Coordinated Antitrust Policy signed in Moscow on 25 January 2000.[37] The new treaty contains two annexes: the first on the coordination of the policy of states in combating monopolistic activities and unfair competition; and the second on defining the structure and rules of operation of ICAP. As a body within the CIS, ICAP is obliged to act in accordance with the CIS Statute, which is the basic legal act for the whole organisation.

34 The Baltic States (Lithuania, Latvia and Estonia), marked by a common history and close economic and cultural ties, have developed a permanent cooperation of NCAs. This manifests itself in annual conferences, but also in ongoing contacts and mutual administrative assistance. Interestingly, although the cooperation of these countries is strongly similar to networking, it has never taken on a formal network dimension.

35 UNCTAD, Enhancing International Cooperation in the Investigation of Cross-Border Competition Cases. Tools and Procedures, Contribution by Federal Antimonopoly Service, Russian Federation, Geneva 2017, p. 6, http://unctad.org/meetings/en/Contribution/ciclp16th_c_Russian%20Federation_2_revised_en.pdf (accessed 24 July 2021).

36 Competition Council of Moldova, Cooperation within the Interstate Council for Antimonopoly Policy (ICAP) of the Member States of the Commonwealth of Independent States (CIS), https://www.competition.md/slideoneview.php?l=en&idc=39&t=/International-Relations/ (accessed 24 July 2021).

37 Coordinated Antimonopoly Policy Agreement, Moscow 2000, http://en.fas.gov.ru/upload/other/Coordinated%20Antimonopoly%20Policy%20Agreement.pdf (accessed 24 July 2021).

5.1.4.3 Network aims

ICAP has four main objectives:

- to perfect the law of ICAP members (this mandate is broad, encompassing competition law, advertising law, consumer protection, natural monopolies and public procurement);
- to develop administrative cooperation between the NCAs of ICAP members;
- to promote competition policy within the CIS countries and societies; and
- to encourage staff development of the competition authorities.[38]

5.1.4.4 Membership

ICAP is a closed network whose members are the NCAs of the CIS countries. No forms of participation in the form of observers are provided for; and there are no institutionalised forms of representation of entities outside the sphere of national public administration.

5.1.4.5 Internal organisation

The network has two bodies: the Council and the Secretariat. The Council is formed by two representatives (with one vote) from each CIS member state. The Secretariat, on the other hand, provides services for the meetings (sessions) and work of the Council. ICAP is one of the few CIS bodies to hold regular meetings (sessions) twice a year, which are organised in turn by all NCAs. The ICAP closely cooperates with the CIS Executive Secretariat and implements the decisions of that body.

There are two more specialised bodies within the ICAP:

- The Advertising Coordination Committee was established in September 2004 to coordinate the national authorities of the CIS countries responsible for monitoring compliance with advertising law. The Committee has established a special website[39] containing information about national regulations on advertising law and the public institutions involved in their control. The Committee also organises workshops on current issues in advertising law and the exchange of national experience in this field.[40]
- The Headquarters for Joint Proceedings against Antitrust Violations in the CIS Countries was established in 2006 for the joint (parallel) conduct of

38 Ministry of the Economy of the Republic of Belarus, Interstate Council for Antimonopoly Policy of CIS countries (ICAP), http://www.economy.gov.by/en/Interstate-Council-en/ (accessed 24 July 2021).

39 Рекламный сёвет [Setevoye izdaniye, "Reklamnyy sovet"], http://sovetreklama.org (accessed 24 July 2021).

40 Federal Antimonopoly Service of the Russian Federation, ICAP Coordination Council on Advertising, http://en.fas.gov.ru/international-cooperation/icap/council-on-advertising/ (accessed 24 July 2021).

> proceedings, including market investigations, by NCAs. The joint conduct of proceedings is entirely voluntary. The Headquarters also organises meetings (sessions) for the exchange of experience and the formulation of recommendations regarding identified market problems in the CIS countries.[41]

Additionally, the Non-Commercial Partnership Promoting Competition in the CIS Countries operates under ICAP. It provides a forum for cooperation between the bodies operating within ICAP, with leading lawyers and economists dealing with competition policy and law in the CIS countries. The Partnership aims to further the harmonisation of the national anti-monopoly legislation of the CIS countries, to promote cooperation between the NCAs and businesses, and to develop international cooperation in the field of competition protection.[42]

5.1.4.6 Forms of activity

ICAP's activities include soft and hard cooperation. Concerning the former, ICAP organises twice-yearly sessions to discuss current issues arising from the experience of the NCAs. During these sessions, national competition laws are evaluated and opinions recommending changes in national legislation may be issued. In addition, workshops and seminars are organised to exchange experiences and improve the skills of NCA employees. A certain surprise may be the lack of adoption of soft law documents. At the ICAP forum, reports described as 'joint' are presented, although their sole author is the Russian Federal Anti-monopoly Service.[43]

Administrative cooperation under ICAP primarily involves the coordination and joint conduct of competition proceedings. Importantly, these include both market investigations and competition infringement proceedings. ICAP takes no decisions; but on the basis of the collected materials, each NCA that jointly conducted the proceedings issues decisions with respect to businesses operating on its market. The cooperation begins with the designation of priorities and areas subject to special monitoring within ICAP. Initially, ICAP designated three sectors to be monitored: air transport, telecommunications services and retail sales. More recently, it specified that the oil and petroleum products and cereals markets were of special interest.[44] As part of the monitoring, each of the NCAs concerned could

41 Federal Antimonopoly Service of the Russian Federation, Headquarters for Joint Investigations of the Violations of the Antimonopoly Legislation in the CIS Countries, http://en.fas.gov.ru/international-cooperation/icap/icap-headquarters.html (accessed 24 July 2021).

42 See the website of the Ministry of the Economy of the Republic of Belarus, Non-Commercial Partnership Competition Promotion in the CIS Countries, http://www.economy.gov.by/en/Non-Commercial-en/ (accessed 24 July 2021).

43 At least those publicly available (in English version) – see Federal Antimonopoly Service of the Russian Federation, ICAP Coordination. Council on Advertising.

44 UNCTAD, Informal Cooperation among Competition Agencies on Specific Cases. Contribution by Russian Federation, Geneva 2014, p. 5, http://unctad.org/meetings/en/Contribution/CCPB_IGE2014_RTInfCoop_Russia_en.pdf (accessed 24 July 2021).

undertake a market investigation. The existing legislation does not provide for legal possibilities to exchange protected information through ICAP.

5.1.4.7 Network output

ICAP recognises the following as its achievements:

- a reduction in the number of violations of anti-monopoly law in international markets covering the territories of the CIS countries;
- the development of competition both in domestic markets and in relation to external (international) economic activities; and
- the elimination of barriers to the movement of goods and services within the CIS Economic Zone.[45]

The joint conduct of proceedings includes conducting market research that may be the basis for initiating proceedings against companies that violate competition law. Market research is summarised in reports. Two such reports are publicly available (in English): on promoting competition on the pharmaceutical market[46] and on evaluating the availability of medicines.[47] In addition, publicly available information indicates that at least two further reports have been prepared: one on domestic competition in the air transport markets in CIS countries and one on roaming services in CIS countries.[48] The latter report resulted in the initiation of further proceedings by the NCAs of Russia and Kazakhstan, ending in decisions on penalties. This led to a reduction in roaming charges and a significant increase in the number of roaming users.[49]

ICAP emphasises its influence in harmonising national legislation, though there are no common guidelines or recommendations for change. Interestingly, Belarus, Russia and Kazakhstan have adopted a model competition law within the Eurasian Economic Union.[50] Nevertheless, each of these countries has retained separate competition legislation, which is not always based on the enacted common model law.

45 Federal Antimonopoly Service of the Russian Federation, The Interstate Council for Antimonopoly Policy, http://en.fas.gov.ru/international-cooperation/icap/ (accessed 24 July 2021).
46 Federal Antimonopoly Service of the Russian Federation, Report on the Promotion of Competition on the Pharmaceutical Market, http://en.fas.gov.ru/upload/other/Report%20on%20the%20Promotion%20of%20Competition%20in%20the%20Pharmaceutical%20Market.pdf (accessed 22 July 2020).
47 Federal Antimonopoly Service of the Russian Federation, Results of the Assessment of Pharmaceuticals Affordability, 2013, http://en.fas.gov.ru/upload/other/Results%20of%20the%20Assessment%20of%20Pharmaceuticals%20Affordability.pdf (accessed 22 July 2020).
48 Ibid. Headquarters for Joint Investigations of the Violations.
49 Ibid.
50 Federal Antimonopoly Service of the Russian Federation, Model Law on Competition, http://en.fas.gov.ru/international-cooperation/eeu/eeu-model-law/ (accessed 24 July 2021).

ICAP is also involved in promoting international cooperation with NCAs outside the CIS countries. This is evidenced by a memorandum of understanding signed by ICAP and the NCAs of South Korea, Latvia and Romania.[51] This provides the basis for developing soft cooperation between these authorities in the form of organising meetings and seminars; as well as the Korean NCA sending its experts to assist the ICAP NCAs. However, there is no publicly available information on the actual extent of this cooperation.

Despite its name, ICAP deals with issues that are broader than just competition law. Particularly noticeable are its achievements in the field of advertising law, including the creation of a 'portal', which in fact is a large regional database. This activity has undoubtedly contributed to the harmonisation of law in this area.[52]

5.1.4.8 Forms and scope of cooperation

ICAP started as an information network of national NCAs based on regular (twice-yearly) meetings. As part of these meetings, each country is subject to an assessment, based on which ICAP can issue an opinion recommending that certain changes be taken to harmonise national legislation. However, ICAP has never issued any official recommendations or guidelines on the shape of competition law, which makes its opinions quite discretionary. At the same time, the recommendations of ICAP issued after the sessions are not binding on the CIS countries.

The NCAs can coordinate their proceedings through ICAP. Importantly, this coordination applies to both market investigations and the competition proceedings that may result from them. It is also important that countries designate common markets of interest, which shows that economic problems – including those relating to competition – may be common to CIS countries. While this cooperation is advanced, its practical effects are not as far-reaching. This seems to be the result of a lack of sufficient political will. Within the framework of this cooperation, each country acts independently on the basis of its own national legislation and makes its own decisions. The council does not provide a basis for the exchange of legally protected information.

5.1.4.9 Network characteristics: summary

ICAP is a closed, horizontal network of an informational and partly administrative nature. It is a regional network grouping of NCAs belonging mostly to the Asian

51 Federal Antimonopoly Service of the Russian Federation, Memorandum Regarding Cooperation in Competition Policy among the Fair Trade Commission of the Republic of Korea, the Competition Council of the Republic of Latvia, the Competition Council of Romania and the Interstate Council for Antimonopoly Policy of CIS countries, http://en.fas.gov.ru/upload/other/MoU%20between%20competition%20authorities%20of%20Korea,%20Latvia,%20Romania%20and%20the%20ICAP.pdf (accessed 24 July 2021).

52 Federal Antimonopoly Service of the Russian Federation, ICAP Coordination Council on Advertising, http://en.fas.gov.ru/international-cooperation/icap/council-on-advertising/ (accessed 24 July 2021).

cultural circle. The activities of ICAP are dominated by the Russian Federal Antimonopoly Service, due to the dominance of Russia within the CIS. The publicly available information shows that the actual administrative cooperation mainly takes place between the NCAs of Russia and Kazakhstan, as well as Belarus. This cooperation is thus limited to NCAs from countries that have decided to deepen integration and have founded the Eurasian Economic Union.[53] This reveals that not all NCAs are open to deeper cooperation. At the same time, this cooperation should be rated very highly because, next to the Nordic Cooperation, ICAP is the most advanced of the existing regional networks. One may wonder what long-term impact the functioning of the Eurasian Economic Union – which involves many provisions on competition law, cooperation among NCAs and even the issue of competition decisions by the Eurasian Economic Commission –will have on the cooperation within ICAP.[54]

5.2 Africa and the Middle East

5.2.1 West African Monetary Union

5.2.1.1 Origin and history

The West African Monetary Union (WAEMU) was established in 1994 by seven West African countries that use the CFA franc. In 1997, Guinea-Bissau – as the first non-francophone country – became the eighth member of WAEMU. WAEMU is a member of the Economic Community of West African States (ECOWAS) and the Organisation for the Harmonisation of Business Law in Africa.

5.2.1.2 The legal basis for WAEMU's activities

WAEMU's legal basis is a treaty signed in Dakar on 10 January 1994 by the heads of state and government of the founding members.[55] The treaty came into force on 1 August 1994, after ratification by the member states. WAEMU is the only regional integration organisation in the world that has established a centralised, hierarchical model, under which its competition rules enjoy supremacy and direct effect; member state NCAs play a subordinate role in the enforcement of those rules, primarily assisting the WAEMU Competition Commission it its investigations and inquiries.[56]

53 Armenia and Kyrgyzstan joined the Union later.

54 The Commission is only competent in relation to anti-competitive practices, not for merger control – UNCTAD, International Cooperation on Merger cases as a tool for effective enforcement of competition, Contribution by the Russian Federation, p. 5, http://unctad.org/meetings/es/Contribution/CCPB_7RC2015_RTIntCoop_RussianFed_en.pdf (accessed 24 July 2021).

55 The Amended Treaty, http://www.uemoa.int/en/amended-treaty (accessed 24 July 2021).

56 T. Büthe, V. K. Kigwiru, 'The Spread of Competition Law and Policy in Africa: A Research Agenda', *African Journal of International Economic Law*, vol. 1, 2020, p. 57.

5.2.1.3 Network objectives

Generally, WAEMU's goal is to reduce trade barriers and enhance economic cooperation.[57] WAEMU's specific goals are outlined in Table 5.1.[58]

Table 5.1 WAEMU's goals

To strengthen the economic and financial competitiveness of member states in an open and competitive market environment and within a streamlined and harmonised legal context.
To secure convergence in the economic performances and policies of member states by instituting multilateral monitoring procedures.
To create a common market among member states, based on the free movement of persons, goods, services and capital; the right of establishment of self-employed or salaried persons; and a common external tariff and common market policy.
To institute the coordination of national sector-based policies by implementing joint actions and administering joint policies, particularly on human resources, territorial administration, agriculture, energy, industry, mines, transport, infrastructure and telecommunications.
To harmonise, to the extent necessary, all actions taken to ensure the smooth running of the common market, the legislative systems of member states, and particularly the taxation system.

The Dakar Treaty provides a legal basis for a common competition policy in Articles 88–90. The particularity of WAEMU competition law is that it applies to purely national cases and confers all decision-making powers on the supranational agency.[59] Furthermore, WAEMU has adopted several secondary law statutes regulating anti-competitive practices, abuse of dominance, merger control and state aid. WAMEU's competition legislation is strongly influenced by the EU system.[60] However, as in certain other jurisdictions (eg, Canada, South Africa and the European Union), WAEMU's competition policy not only includes competition-oriented goals; it is also intended to protect consumers, promote economic efficiency, combat inflation and promote international competitiveness. In addition to these traditional objectives, WAEMU seeks to influence market structures and distribute economic power more widely. It also aims to facilitate integration in regional and globalised economies. In particular, in the context of building a common market, it seeks to improve the free movement of goods by means of a customs union and to support sectoral policies.[61]

57 D. Gerber, *Global Competition,* p. 256.
58 The Amended Treaty, http://www.uemoa.int/en/amended-treaty (accessed 24 July 2021).
59 J. Drexl, 'Economic Integration and Competition Law in Developing Countries', in J. Drexl, M. Bakhoum, E.M. Fox, M.S. Gal, D.J. Gerber (eds), *Competition Policy and Regional Integration in Developing Countries*, Cheltenham, Edward Elgar Publishing, 2012, p. 43.
60 J. Molestina, *Regional Competition Law Enforcement in Developing Countries*, Berlin, Springer, 2019, pp. 10–11.
61 UNCTAD, Voluntary Peer Review on Competition Policies of WAEMU, Benin and Senegal, 2007, p. 7.

5.2.1.4 Membership

WAEMU has eight members: Benin, Burkina Faso, Côte D'Ivoire, Guinea-Bissau, Mali, Niger, Senegal and Togo.

5.2.1.5 Internal organisation

The following bodies all play a role in defining WAEMU's competition policy: the Conference of Heads of State and Government; the Council of Ministers; the Commission; the Court of Justice; the Audit Office; Parliament; the Regional Consular Chamber; the Central Bank of West African States; and the West African Development Bank.[62] The Conference of Heads of State and Government constitutes the highest authority of WAEMU. It takes decisions on the admission of new members, as well as on all matters brought before it by the Council of Ministers. The Council of Ministers is responsible for steering WAEMU. Each member state is represented on the council by two ministers, but only holds one vote, which is cast by the Minister of Finance. The Council of Ministers takes unanimous decisions on the matters placed under its jurisdiction by the WAEMU Treaty.[63] WAEMU's executive body is the Commission. WAEMU is a highly centralised organisation and the Commission plays a very important role in the enforcement of WAEMU laws, including competition law. It conducts administrative proceedings and issues decisions. To a large extent, it mirrors the functions and practice of the European Commission. Judicial protection is served by the Court of Justice and financial control is executed by the Audit Office.[64]

5.2.1.6 Internal organisational units committed to cooperation on competition protection

Due to the highly centralised model of enforcement of WAEMU's competition laws, the role of the NCAs of member states is rather limited. It partially mirrors the EU framework. Under WAEMU's organisational framework functions the Advisory Committee on Competition. This Committee was established on the basis of Article 28 of Regulation 03/2002/CM/UEMOA.[65] While the Advisory Committee is modelled on the ECN,[66] it has never developed to the level of the ECN. The composition and proceedings of the committee are regulated by

62 Ibid, p. 3.
63 Central Bank of West African States, Presentation of WAEMU, https://www.bceao.int/en/content/presentation-wamu (accessed 24 July 2021).
64 WAEMU, Bodies of the UEMOA, http://www.uemoa.int/en/bodies-uemoa (accessed 24 July 2021).
65 Règlement N°3/2002/CM/UEMOA relatif aux procédures applicables aux ententes et abus de position dominante a l'intérieur de l'Union Économique et Monétaire Ouest Africaine, http://www.uemoa.int/sites/default/files/bibliotheque/pages_-_reglement_3_2002_cm_uemoa.pdf (accessed 24 July 2021).
66 M. Bakhoum, J. Molestina, 'Institutional Coherence and Effectivity of a Regional Competition Policy: The Case of the West African Economic and Monetary Union

Regulation of Execution 07/2005/COM/UEMOA.[67] The committee is made up of two representatives of each member state, nominated for a three-year term of office. Opinions are adopted by majority voting, with a highly formalised internal procedure.

The other source of underdevelopment of network cooperation and the limited role of West African NCAs is rivalry between WAEMU and ECOWAS.[68] First, all members of WAEMU are also members of ECOWAS. Second, both organisations have taken a centralised approach to the enforcement of competition laws. Third, there is a visible enforcement rivalry with regard to jurisdiction. As a consequence, the national jurisdiction of West African NCAs is limited and hence they have no special incentives to cooperate.[69]

5.2.1.7 Forms of activity

The Advisory Committee is limited in its role and functions. Therefore, the Committee meets and prepares opinions for the WAEMU Commission when asked. The Commission is obliged to ask the Committee for an opinion when preparing decisions based on WAEMU's competition laws. Its opinions are not binding.

5.2.1.8 Network output

WAEMU has adopted a centralised approach to its competition policy, which diminishes the role of NCAs.[70] Due to the limited function of the Committee, its only output comprises opinions rendered to the WAEMU Commission. The Commission uses the Committee to increase its legitimacy and the effective enforcement of its decisions in WAEMU member states.[71]

5.2.1.9 Forms and scope of cooperation

The main problems that WAEMU faces are the scarcity of resources dedicated to competition protection at the national level and the varying level of development

(WAEMU)', in J. Drexl, M. Bakhoum, E.M. Fox, M.S. Gal, D.J. Gerber (eds), *Competition Policy*, p. 92.

67 Reglement de L'Exécution n° 007/2005/COM/UEMOA portant Reglement interieur du Comite Consultatif de la Concurrence. The document is unfortunately not accessible on the WAEMU site; an overview is provided by J. Molestina, *Regional Competition Law*, pp. 222–224.

68 ECOWAS, About ECOWAS, https://ecowas.int/about-ecowas/ (accessed 24 July 2021).

69 M. Ngom, 'Regional Integration and Competition Policy in the Economic Community of West African States (ECOWAS) Region', in J. Drexl, M. Bakhoum, E.M. Fox, M.S. Gal, D.J. Gerber (eds), *Competition Policy*, pp. 126 ff.

70 M. Bakhoum, J. Molestina, 'Institutional Coherence and Effectivity of a Regional Competition Policy: The Case of the West African Economic and Monetary Union (WAEMU)', *Max Planck Institute for Intellectual Property & Competition Law Research Paper*, iss. 11–17, 2011, p. 3.

71 J. Molestina, *Regional Competition Law*, p. 225.

of competition laws in WAEMU member states.[72] The Committee is the only WAEMU forum in which representatives of WAEMU NCAs can meet. Although it is described as a policy enforcement network,[73] it is a rather unusual network in which vertical elements are predominant and true horizontal relations among network members are scarce and limited. The network could perhaps play a more important role if WAEMU followed the United Nations Conference on Trade and Development (UNCTAD) recommendations. UNCTAD has undertaken a Regional Competition System Reform Project for WAEMU to design a new regional system for the defence of competition. At the core of this system is inter-institutional cooperation, the coordination of activities and the sharing of skills between NCAs and the Commission.[74]

5.2.1.10 Network characteristics: summary

WAEMU's Advisory Committee on Competition is an undeveloped network of NCAs of WAEMU member states. It is a formalised, closed, vertical network that operates within WAEMU's structures. Despite regular participation of member states, it does not guarantee collaboration between NCAs and the WAEMU Commission in the direct enforcement of regional competition law; nor does it significantly enhance horizontal cooperation between NCAs.[75] The Committee is first and foremost an administrative network, and its informational and harmonisation components are barely visible. Given the inherent limits on the development of competition law in Africa and the limited cooperation among NCAs so far, the Committee may be just the starting point of networking in competition law enforcement in West Africa.[76] The centralised system of WEAMU's competition enforcement has proved far from perfect, and more cooperation and networking mechanisms have been proposed to remedy the situation.[77] The recommendations include the centralisation of standards of substantive law and the decentralisation of decision making.[78]

5.2.2 Arab Competition Network

Although very little is known about the Arab Competition Network (ACN), it is worth mentioning as it is probably the youngest TCN in existence.

72 *Voluntary Peer Review on Competition Policies of WAEMU*, Benin-Senegal, UNCTAD, 2007, pp. 23–25.
73 J. Molestina, *Regional Competition Law,* p. 225.
74 UNCTAD, *Towards a Mechanism for Regional Enforcement of Competition Policy in Central America,* 2014, p. 80.
75 J. Molestina, *Regional Competition Law*, p. 225.
76 D. Gerber, *Global Competition*, pp. 257–258.
77 UNCTAD, *Towards a Mechanism for Regional Enforcement of Competition Policy in Central America*, 2014, p. 81.
78 M. Bakhoum, J. Molestina, 'Institutional Coherence and Effectivity', p. 23.

5.2.2.1 Origin and history

The ACN was established on 16 March 2022 in Cairo, Egypt.[79] The driving force behind the network was Egypt. The ACN is intended to be the first network to provide Arab NCAs with an official platform to meet and discuss prominent issues and impending changes to antitrust law.[80] The network brings together representatives of NCAs from Saudi Arabia, Algeria, Bahrain, the United Arab Emirates, Jordan, Libya, Kuwait, Qatar, Palestine, Oman, Sudan, Tunisia, Yemen, Morocco, Egypt, Syria and Lebanon. The ACN builds on the framework of the League of Arab States.[81]

5.2.2.2 Legal basis

The legal basis for the ACN is a joint statement which was signed by the heads of the participating NCAs.[82] The basis for this statement was a Protocol on Cooperation in the Field of Competition among Arab Countries.[83] The Protocol aims to build and strengthen cooperation and coordination between the members of the Arab League through the exchange of expertise and experience and capacity-building; and to provide the necessary support to Arab countries seeking to enact or develop their own competition legislation.[84]

5.2.2.3 Network aims

The goals of the ACN are set out in Table 5.2.[85]

5.2.2.4 Membership

The ACN is a closed network open to the Arab League countries.

79 Arab Competition Network, https://arabcompetitionnetwork.com/ (accessed 14 April 2022).
80 Global Competition Review, Egypt Proposes First-Ever Arab Competition Network, https://globalcompetitionreview.com/egypt-proposes-first-ever-arab-competition-network (accessed 14 April 2022).
81 League of Arab States, http://www.lasportal.org/ar/Pages/default.aspx (accessed 14 April 2022).
82 Global Competition Review, Arab Competition Network Launches, https://globalcompetitionreview.com/coronavirus/arab-competition-network-launches (accessed 14 April 2022).
83 Protocol on Cooperation in the Field of Competition among Arab Countries, https://arabcompetitionnetwork.com/law-and-protocol/ (accessed 14 April 2022).
84 Ibid.
85 Baker McKenzie, First Meeting of the Arab Competition Network – Objectives and Implications, https://me-insights.bakermckenzie.com/2022/03/28/first-meeting-of-the-arab-competition-network-objectives-and-implications/ (accessed 14 April 2022).

Table 5.2 The ACN's goals

To assist Arab competition authorities in maintaining regular and effective communication, and to share and agree on certain concepts and positions.
To promote effective cooperation on issues of common concern.
To exchange periodically experiences and updates on the most prominent developments in areas concerning competition.
To promote joint cooperation between competition authorities to build their capabilities in the field of competition law and policy enforcement.
To increase the effectiveness of joint cooperation between competition authorities to encourage further growth and free competition within the Arabian markets.
To promote joint cooperation in combating the potential obstacles to Arab economic integration.

5.2.2.5 Internal organisation

The work of the network is coordinated by the Secretariat General. There are also six working groups: Horizontal Agreements (Cartels); Vertical Agreements; Abuse of Dominance; Mergers and Acquisitions; Awareness of Competition Policies; and Institutional Efficiency of Competition Authorities.[86]

5.2.2.6 Forms of activity

The action items to which the ACN has agreed are set out in Table 5.3.[87]

Table 5.3 The ACN's enforcement agenda

Periodic meetings: Members of the ACN will meet once a year to discuss key competition issues.
Combined research: Members of the ACN will cooperate to conduct research on the challenges that they face with regard to competition law enforcement and to propose solutions via specialised working groups. Topics will include vertical and horizontal agreements, abuse of dominance and mergers and acquisitions.
Training and capability-building programmes: Comprehensive training programmes tailored to specific needs will be put in place.
Knowledge exchange programmes: These include the establishment of an electronic knowledge centre aimed at exchanging materials on competition policy enforcement and awareness.

86 Arab Competition Network, https://arabcompetitionnetwork.com/ (accessed 14 April 2022).

87 Baker McKenzie, First Meeting of the Arab Competition Network – Objectives and Implications, https://me-insights.bakermckenzie.com/2022/03/28/first-meeting-of-the-arab-competition-network-objectives-and-implications/ (accessed 14 April 2022).

5.2.2.7 Network output

It is too early to say anything about the output of the network.

5.2.2.8 Forms and scope of cooperation

It is not possible to say anything about the actual forms of cooperation in which the members of the ACN have been engaged. The plans of the network, as described earlier, are ambitious. However, the coming months will reveal the actual scope of cooperation among ACN members.

5.2.2.9 Network characteristics: summary

The ACN is a closed horizontal network of an informational and partly administrative nature. The network is an expression of the policy of the Egyptian NCA, which is seeking to play a leading role in promoting cooperation between the NCAs of Arab countries. The development of cooperation among Arab NCAs has been expected by many stakeholders[88] and it is interesting that it has taken the institutionalised form of a network. The ACN builds on the existing forms of cooperation in the field of competition policy within the League of Arab States. The declared set of activities consists of effective mechanisms of cooperation including capacity building, law and policy harmonisation, as well as cooperation on actual cases. Time will tell which of these types of activities will succeed and to what extent. The establishment of the ACN is a clear sign that the network model of cooperation among NCAs remains relevant and attractive.

5.3 Asia

5.3.1 Association of Southeast Asian Nations

5.3.1.1 Origin and history

The Association of Southeast Asian Nations (ASEAN) is an intergovernmental organisation founded on 8 August 1967 in Bangkok. Its headquarters is in Jakarta.

5.3.1.2 Legal basis

The legal basis for ASEAN's operation is the ASEAN Declaration (Bangkok Declaration).[89] The Treaty of Amity and Cooperation in Southeast Asia is a

88 E.M.M. Dabbah, 'The Regionalisation of Competition Law. A Future Role for the International Competition Network (ICN)?', in P. Lugard, D. Anderson (eds), *The ICN at Twenty*, pp. 116 ff.

89 The ASEAN Declaration (Bangkok Declaration), Bangkok, 8 August 1967, https://agreement.asean.org/media/download/20140117154159.pdf (accessed 12 March 2022).

further development of the organisation.[90] In principle, ASEAN's working methods and decision-making process are based on consultation and consensus on all matters, unless there are specific provisions in other legal matters.[91] Consensus-seeking guarantees the manifestation of self-determination and an autonomous decision-making process for every member state; but it is also burdensome, time consuming and difficult, and makes substantive outcomes less likely.[92]

5.3.1.3 Network aims

ASEAN's objectives are set out in Table 5.4.[93]

Table 5.4 ASEAN's goals

To accelerate economic growth, social progress and cultural development in the region through joint efforts in a spirit of equality and partnership, in order to strengthen the foundation for a prosperous and peaceful community of nations in Southeast Asia.
To promote active cooperation and mutual assistance on matters of common interest in economic, social, cultural, technical, scientific and administrative fields.
To provide mutual assistance in the form of training and research facilities in the educational, professional, technical and administrative spheres.
To facilitate more effective cooperation for greater use of agriculture and industry.
To promote trade development, including the study of problems of international trade in goods.
To improve transport and communication infrastructure.
To raise people's living standards.

The ASEAN countries have neither a single regional competition framework nor a single ASEAN competition authority. They rely on soft convergence and the development of national competition laws and NCAs.[94] This evolutionary approach to the development of the ASEAN competition regime has been praised both for respecting the needs and capabilities of members states and for providing a peaceful method for the resolution of any disagreements.[95]

90 Treaty of Amity and Cooperation in Southeast Asia Indonesia, 24 February 1976, https://humanrightsinasean.info/wp-content/uploads/files/documents/ASEAN_Treaty_Amity_Cooperation_1976.pdf (accessed 12 March 2022).

91 W. Huck, 'Informal International Law-Making in the ASEAN: Consensus, Informality and Accountability', *ZaöRV*, vol. 80, iss. 1, 2020, p. 115.

92 Ibid.

93 The ASEAN Declaration (Bangkok Declaration) Bangkok, 8 August 1967.

94 R. Lapa Maximiano, R. Burgess, W. Meester, 'Promoting Convergence in ASEAN Competition Laws and Practice', in P. Burnier da Silveira, W.E. Kovacic (eds), *Global Competition Enforcement*, p. 234.

95 W. Khatina Nawawi, 'Regionalisation of Competition Law and Policy in ASEAN: Why, How, and When?', in B. Ong (ed), *The Regionalisation of Competition Law and Policy within the ASEAN Economic Community*, Cambridge, CUP, 2019, p. 46.

5.3.1.4 Membership

In principle, ASEAN is open to all countries in the region that accept the principles of the ASEAN Declaration. ASEAN's current members are the Philippines, Indonesia, Malaysia, Singapore, Thailand, Brunei, Vietnam, Laos, Myanmar and Cambodia.

5.3.1.5 Internal organisation

The highest authority of ASEAN is the Meeting of Heads of Government, which takes directional decisions. At a lower level are the ministerial conferences, which meet regularly and oversee the work of other ASEAN bodies on an ongoing basis. The day-to-day work of ASEAN is the responsibility of the Standing Committee, which is assisted by a Secretariat headed by the Secretary General, who holds office for three years.

5.3.1.6 Internal organisational units committed to cooperation on competition protection

Competition law issues are studied by and developed through the ASEAN Experts Group on Competition (AEGC). The AEGC was established in August 2007 further to a decision of the ASEAN Economic Ministers. They supported the establishment of the AEGC as a regional forum for discussion and cooperation on competition policy and law. Previously, there was no official working body on competition policy in ASEAN, as not all member states had established NCAs.[96] In terms of competition policy development, an important model for ASEAN is the European Union and its model of close economic integration, with a strong and unifying role for competition law.[97] The AEGC is the central forum through which action plans relating to ASEAN competition policy are carried out, providing a focal point for undertaking the cooperative activities necessary to implement ASEAN's capacity-building and institutional goals.[98]

The AEGC is composed of state-designated representatives from the relevant NCAs, where such authorities have been established. It also includes representatives of the public administration bodies that are most directly involved in and responsible for competition policy in ASEAN member countries where NCAs have not yet been established. The establishment of the AEGC has significantly strengthened cooperation between the NCAs of the ASEAN countries and developed it beyond the exchange of information towards gradual harmonisation and even the beginnings of administrative cooperation.[99] The significant contributions

96 A. Amunategui Abad, 'Competition Law and Policy in the Framework of ASEAN', in J. Drexl, M. Bakhoum, E.M. Fox, M.S. Gal, D.J. Gerber (eds), *Competition Policy,* p. 43.

97 E.M. Fox, 'Can ASEAN Achieve a Single Market with National-Only Competition Law?', in B. Ong (ed), *The Regionalisation of Competition Law,* p. 159.

98 B. Ong, 'Competition Law and Policy in the ASEAN Region: Origins, Objectives and Opportunities', in B. Ong (ed), *The Regionalisation of Competition Law,* p. 8.

99 D.L.Y. Siadari, K. Arai, 'International Enforcement of ASEAN Competition Law', *JECLP*, vol. 9, iss. 5, 2018, p. 3.

of the AEGC can be seen from its activities, which are carried out via its five working groups: Regional Guidelines on Competition Policy; Handbook on Competition Policy and Law in ASEAN for Business; Capacity Building; Regional Core Competencies in Competition Policy and Law; and Strategy and Tools for Regional Competition Advocacy.[100]

In 2018, the idea of establishing an additional forum of cooperation for NCAs within ASEAN emerged. Unlike the AEGC, this new forum was to be of an administrative nature and involve cooperation in handling joint cases of merger control or anti-competitive practices. However, participation in the network was to be voluntary.[101] This idea was implemented and the ASEAN Competition Enforcers' Network (ACEN) was established on 10 October 2018.[102] It is difficult to assess this initiative at present, as no more detailed information on the subject – let alone deeper analysis – is available. The increased cooperation of NCAs on the Uber merger can be considered as a catalyst for the establishment of ACEN.[103] The motive behind ACEN was a desire to deepen cooperation among the NCAs of ASEAN countries. However, in the absence of formal binding rules to be applied by the network, and given the significant differences between individual network members, it seems that ACEN is based on soft cooperation; and the forum itself will remain an information network and, to some extent, a harmonisation network. ACEN supplements the AEGC. The latter remains primarily a harmonisation, information and analytical network; whereas ACEN is designed for internal discussions among ASEAN NCAs. ACEN is a better forum for such discussions and administrative cooperation, as it is informal and closed to the public. By contrast, the meetings of AEGC are often open to the public and are not limited to NCAs.

5.3.1.7 Forms of activity

The AEGC is primarily a forum for discussion and the exchange of experience. In addition, initiatives are taken to approximate national legislation in the field of competition law. The AEGC has identified four areas as priorities:[104]

- strengthening the regulatory environment in ASEAN;
- building institutional capacity and implementing competition law and policy in ASEAN;

100 C. Lee, Y. Fukunaga, 'ASEAN Regional Cooperation on Competition Policy', *Journal of Asian Economics,* vol. 35, 2014, p. 87.

101 Global Competition Review, Singapore Chief Hopes for ASEAN Enforcers' Network in 2018, https://globalcompetitionreview.com (accessed 16 April 2018).

102 ASEAN, ASEAN Establishes Competition Enforcers' Network, Regional Cooperation Framework, and Virtual Research Centre, https://asean.org/asean-establishes-competition-enforcers-network-regional-cooperation-framework-virtual-research-centre/ (accessed 24 July 2021).

103 This merger is directly indicated in the background information on creation of ACEN – see ibid.

104 ASEAN Expert Group on Competition (AEGC), https://asean-competition.org/aegc (accessed 24 July 2021).

- developing strategies and tools to promote regional competition law; and
- building cross-cutting regional initiatives.

The stated objectives of competition cooperation within ASEAN are translated into its forms. Cooperation has a very practical dimension, geared towards teaching the NCAs involved and lobbying to build efficient competition regimes in all ASEAN countries.

5.3.1.8 Network output

Initially, the AEGC was intended to be a regional forum that would promote the exchange of information and experience and cooperation on competition policy in the region; and it adopted some cooperation mechanisms towards this end.[105] The AEGC has highlighted that its cooperation has led to significant progress in fostering a culture of competition, with nine out of ten ASEAN countries enacting national competition laws.[106] While it is questionable whether this has been a major factor in the adoption of competition legislation by ASEAN countries, the AEGC has certainly assisted in this.

Another important achievement of the AEGC has been the development of soft law documents in the form of regional competition law guidelines;[107] guidelines on key competences in competition law and policy;[108] and a self-assessment tool on competition law and the promotion of competition policy.[109] An important accomplishment of the network was the adoption of the ASEAN Regional Cooperation Framework. This serves as a set of guidelines for ASEAN member states to cooperate on competition cases. It sets out the general objectives, principles and possible areas of cooperation among ASEAN member states that may be undertaken on a bilateral, multilateral, sub-regional or regional basis – and on a voluntary basis – in relation to the development, application and enforcement of competition laws.[110] In addition, the AEGC has produced a number of other publications, including a handbook

105 W. Ng, 'From Divergence to Convergence: The Role of Intermediaries in Developing Competition Laws in ASEAN', *JAE*, iss. 10, 2022, p. 170.
106 ASEAN Expert Group on Competition (AEGC), https://asean-competition.org/aegc (accessed 24 July 2021).
107 ASEAN Regional Guidelines on Competition Policy, https://asean-competition.org/read-publication-asean-regional-guidelines-on-competition-policy (accessed 24 July 2021).
108 ASEAN, Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN, https://asean-competition.org/read-publication-guidelines-on-developing-core-competencies-in-competition-policy-and-law-for-asean (accessed 24 July 2021).
109 ASEAN Self-Assessment Toolkit on Competition Enforcement and Advocacy, https://asean-competition.org/read-publication-asean-self-assessment-toolkit-on-competition-enforcement-and-advocacy (accessed 24 July 2021).
110 ASEAN Establishes Competition Enforcers' Network, Regional Cooperation Framework, and Virtual Research Centre, https://www.cccs.gov.sg/media-and-consultation/newsroom/media-releases/22nd-aegc-meeting-asean-establishes-competition-enforcers (accessed 12 March 2022).

for business on competition law[111] and a Competition Compliance Toolkit. The latter provides businesses with information on the basic principles of competition law and the benefits of competition compliance, as well as guidelines on how to implement an internal competition compliance programme.[112]

The literature highlights that ASEAN members diverge considerably in their adherence to the guidelines. The weakness of these guidelines is that they largely replicate international best practices of NCAs, instead of drawing on the specific experience of the NCAs that make up ASEAN. At the same time, it is advocated that the network be strengthened by empowering the AEGC to conduct peer reviews. Furthermore, the need to expand the existing joint database of ongoing investigations has been highlighted.[113]

The AEGC has conducted numerous workshops, training programmes and seminars to strengthen the capacity of NCAs in institution building and the enforcement and promotion of competition policy. The most important events are ASEAN Competition Conferences (ACCs). The most recent – the Ninth ASEAN ACC – was held online from 1–2 December 2021 under the theme 'Safeguarding Competition – A Post-Pandemic Response'.[114] The next one is scheduled for 2023. Developing the analytical output of the network, the AEGC has also launched the Virtual ASEAN Competition Research Centre. The Virtual Centre hosts:

- a repository of research articles which are a useful reference for researchers and NCAs examining competition issues in the region;
- a database of profiles of researchers/academics with an interest in competition policy and law in the region; and
- a section on promoting research collaboration on competition in ASEAN.[115]

5.3.1.9 Forms and scope of cooperation

The NCAs operating within ASEAN primarily interact by holding meetings and exchanging experiences. These meetings result in information and training materials, as well as guidelines indicating how ASEAN countries should shape their

111 ASEAN, Handbook on Competition Policy and Law in ASEAN for Business, https://asean-competition.org/read-publication-handbook-on-competition-policy-and-law-in-asean-for-business (accessed 24 July 2021).

112 ASEAN, Competition Compliance Toolkit for Businesses in ASEAN, https://asean-competition.org/read-publication-competition-compliance-toolkit-for-businesses-in-asean (accessed 12 March 2022).

113 P. Porananond, *A Critical Analysis of the Prospects for the Effective Development of a Regional Approach to Competition Law in the ASEAN Region. PhD Thesis*, University of Glasgow, 2016, pp. 182–187, http://theses.gla.ac.uk/7489/ (accessed 24 July 2021).

114 Philippine Competition Commission, ASEAN Competition Conference Highlights: Safeguarding Competition – A Post-Pandemic Response of ASEAN Competition Authorities, https://web.archive.org/web/20220808162918/https://www.phcc.gov.ph/press-releases/postop-9acc/ / (accessed 29 July 2022).

115 ASEAN, The Virtual ASEAN Competition Research Centre, https://asean-competition.org/research/ (accessed 12 March 2022).

competition legislation and administrative practice. The AEGC intends to intensify the interaction of the NCAs, as reflected in the ASEAN Competition Action Plan 2016–2025.[116] The AEGC aims to encourage all ASEAN countries to adopt competition laws and strengthen existing legal institutions. It is also expected to seek to strengthen the capacity of NCAs in ASEAN member states by establishing and implementing the institutional mechanisms necessary for the effective enforcement of national competition laws, including comprehensive technical assistance and capacity building. Equally importantly, the AEGC hopes to foster a competition culture in ASEAN countries through lobbying and awareness campaigns. Another plan of the AEGC is to promote the adoption of regional cooperation agreements on competition policy and law to effectively deal with the cross-border commercial behaviour of undertakings. The AEGC further intends to pursue greater harmonisation of competition policy and law in ASEAN through the development of a regional convergence strategy. This will also be done by ensuring that the chapters on competition policy and law negotiated by ASEAN under the various free trade agreements with dialogue partners and other ASEAN trading countries are consistent, so as to maintain a coherent approach to competition policy and law in the region.

5.3.1.10 Network characteristics: summary

The AEGC is a closed horizontal information and harmonisation network of ASEAN countries. Particularly noteworthy is the harmonisation component, which is expressed in the adoption of guidelines and the creation of a database containing information on cases handled and administrative decisions issued. The high frequency and broad range of activities organised by AEGC and involving officials from ASEAN NCAs suggest that the competition policy network anchored around the AEGC is fairly strong.[117] The AEGC's action plan places strong emphasis on the harmonisation of national laws and international agreements that are binding ASEAN countries. The development of the current network of ASEAN NCAs to include administrative cooperation (ACEN) is also noteworthy. While this is a logical consequence of harmonisation, it is questionable how feasible this administrative cooperation will be, given the lack of experience of many ASEAN countries in applying competition law. At the same time, given the significant differences between ASEAN countries, the possibility of enacting common binding regional competition law rules is unrealistic.[118] Therefore, ASEAN may need to tolerate the persistence of some national differences until individual economies have become more evenly developed. As a consequence, networking seems the optimal way to pursue the development of competition law within ASEAN.[119]

116 See: ASEAN Competition Action Plan (ACAP) 2016–2025, https://asean-competition.org/about-aegc-asean-competition-action-plan-acap-2016-2025 (accessed 24 July 2021).

117 C. Lee, Y. Fukunaga, 'ASEAN Regional Cooperation', p. 88.

118 P. Porananond, *A Critical Analysis*, pp. 185 ff.

119 L. Thanadsillapakul, 'The Harmonization of ASEAN: Competition Laws and Policy from an Economic Integration Perspective', in J. Drexl, M. Bakhoum, E.M. Fox, M.S. Gal, D.J. Gerber (eds), *Competition Policy,* pp. 31–32.

5.4 South America

5.4.1 Andean Community

5.4.1.1 Origin and history

The Andean Community (*Comunidad Andina* (CAN)) is a free trade area with the objective of creating a customs union comprising the South American countries of Bolivia, Colombia, Ecuador and Peru. The Andean Community dates back to 1969, when Bolivia, Chile, Colombia, Ecuador and Peru signed the Cartagena Agreement and the original Andean Pact was formed. In 1996, the current name – CAN – was adopted, together with substantial changes to the structure of the organisation.

5.4.1.2 Legal basis

The legal basis for CAN is provided by the *Acuerdo de Integracion Subregional Andino* (*Acuerdo de Cartagena*),[120] which has been amended on numerous occasions. Furthermore, the CAN governments have adopted Decision 608 setting out rules which prohibit and punish conduct that restricts free competition and affects the sub-region. However, there are no common rules on merger control or state aid supervision.[121] Regional provisions in CAN are directly applicable in member states, but NCAs cannot enforce regional legislation. The power to enforce interim or final decisions adopted by the Secretary General of CAN lies with the governments of member states.[122] Decision 608 is important because it obliges Andean NCAs to cooperate closely.[123]

5.4.1.3 Network aims

The Andean countries follow an 'open regionalism' approach. Competition policy plays three important roles in this process. First, it enhances market access for new competitors. Second, it protects the competition process from restrictive business practices. Third, and most importantly, it fosters economic efficiency and consumer welfare.[124] In CAN, the implementation of national competition law and

120 CAN, Documentos Básicos, http://www.comunidadandina.org/Documentos.aspx (accessed 24 July 2021).

121 UNCTAD, *Towards a Mechanism for Regional Enforcement of Competition Policy in Central America*, 2014, pp. 82–83.

122 OECD, Global Forum on Competition, Regional Competition Agreements: Benefits and Challenges, p. 9, DAF/COMP/GF(2018)5, https://one.oecd.org/document/DAF/COMP/GF(2018)5/en/pdf (accessed 24 July 2021).

123 J. Cortázar, 'Andean Competition Law: Looking for the Private Sector, or the Quest for the Missing Link in Antitrust', in J. Drexl, M. Bakhoum, E.M. Fox, M.S. Gal, D.J. Gerber (eds), *Competition Policy*, p. 136.

124 A.J. Jatar, L. Tineo, 'Competition Policy in the Andean Countries: A Policy in Search of its Place', in J. Drexl, M. Bakhoum, E.M. Fox, M.S. Gal, D.J. Gerber (eds), *Competition Policy*, pp. 169–186.

institutions – albeit unquestionably a goal of regional competition law – is not based on an explicit obligation contained in regional competition law.[125] It has resulted in the gradual approximation of laws among CAN countries, but the actual extent of enforcement varies significantly from country to country. According to the Cartagena Agreement, CAN pursues the objectives of 'promoting the balanced and harmonious development of the Member Countries under equitable conditions, through integration and economic and social cooperation; to accelerate their growth and the rate of creation of employment', for the purpose of 'bringing about an enduring improvement in the standard of living of the subregion's population'. The objective of forming a common market is not specified in the Cartagena Agreement but has been expressed by the Andean heads of state at various summits.[126]

5.4.1.4 Membership

CAN has four members – Bolivia, Colombia, Ecuador and Peru; five associate members – Argentina, Brazil, Paraguay, Uruguay and Chile; and two observer countries – Spain and Morocco.

5.4.1.5 Internal organisation

CAN established the Andean Committee for the Defence of Free Competition as the unit responsible for cooperation in competition law. The Committee is more formal than a forum, with the legal nature of a technical group already endorsed by regional competition law. It is considered to be part of an international organisation. An internal organisation restructured and approved the Andean Committee in October 2005.[127] The Andean Committee for the Defence of Free Competition is primarily an advisory group of the Andean NCAs, representatives of regulatory agencies and the Andean Community Secretariat.[128]

5.4.1.6 Internal organisational units committed to cooperation on competition protection

The enforcement of common rules on competition is divided between two institutions: the Secretary General of CAN and the Andean Committee for the Defence of Free Competition. The Secretary General acts as a community supranational authority that conducts investigations and issues decisions; whereas the Committee serves as an advisory body. However – in contrast to the EU

125 J. Molestina, *Regional Competition Law*, p. 148.
126 UNCTAD, *Towards a Mechanism for Regional Enforcement of Competition Policy in Central America*, 2014, p. 82.
127 Acta de la Segunda Reunión Ordinaria del Comité Andino de Defensa de la Competencia (D), 3 October 2005, Lima, Perú, SG/R.CDC/II/ACTA 2.17.28.
128 J. Cortázar, 'Andean Competition Law', p. 136.

experience, where the European Commission was a pacemaker in the development of national antitrust provisions in member states – in CAN it is actually the other way around: the Secretariat is expected to draw from the wider experience gained by the NCAs of Peru, Colombia and Venezuela.[129] The Andean Committee for the Defence of Free Competition is a body formed by representatives from each of the member states that serves to guide the Secretary General.[130] One of its most important functions is to formulate opinions on the results of specific investigations into possible anti-competitive behaviour according to Article 21 of Decision 608.[131] The Committee was established when the CAN countries decided to strengthen the legal response to this type of regional business practice by adopting a regional competition law to tackle transnational anti-competitive practices.[132]

5.4.1.7 Forms of activity

The Andean Committee, as part of the regional law enforcement scheme, has two primary and formal functions: to assist in investigations carried out by the Andean Community Secretariat; and to undertake advocacy activities. The Committee expresses itself through '*informes*'. Although these '*informes*' do not bind the Secretary General, it must provide reasons for any deviation from the Committee's results expressed in an '*informe*'.[133]

5.4.1.8 Network output

CAN's actual output is rather limited. Commentators suggest that there are four reasons for the underdeveloped cooperation of members and CAN's rather limited output.[134] First, competition policy still depends heavily on individuals rather than on institutions. The heads of the NCAs play a determining role in shaping policy, which cannot easily be departed from by the supposedly independent agencies. Second, the governments of CAN countries have shown a lack of commitment to competition policy, which has increased rent-seeking activity by traditional business groups. Third, the laws have been applied very differently in similar situations. Fourth, the Andean countries and existing agencies have overlooked the regional role that competition policy could play in the integration project. The Andean institutions have lost their leadership in this area, to the extent that competition policy is left to each country.[135]

129 I. De Leon, *An Institutional Assessment of Antitrust Policy*, p. 84.
130 UNCTAD, *Towards a Mechanism*, p. 83.
131 J. Molestina, *Regional Competition Law*, p. 226.
132 P. Horna, 'Can Accountability and Effectiveness', p. 315.
133 J. Molestina, *Regional Competition Law*, p. 226.
134 A.J. Jatar, L. Tineo, *Competition Policy*, p. 169–186.
135 Ibid.

5.4.1.9 Forms and scope of cooperation

The Andean Committee for the Defence of Free Competition plays an advisory role to CAN institutions. The conclusions and recommendations of the Andean Committee are not binding on the Secretary General. However, the Secretary General must expressly state the reasons for any departure from the recommendations of the Committee.[136]

5.4.1.10 Network characteristics: summary

The network of NCAs that operates with the Andean Committee is a formalised, open, horizontal network. It is predominantly an administrative network. The horizontal component is very limited and its role is not growing. The Andean Committee on the Defence of Free Competition has not lived up to expectations, as evidenced by long periods of inactivity.[137] The limited role of, and cooperation between, Andean NCAs within the network may be also explained by the general ineffectiveness of Decision 608.[138] There is a proposal that the Andean Committee on the Defence of Free Competition be restructured into an informal horizontal information exchange platform.[139] This redesign would help to change the character of the network to informational, which would probably better address the actual needs of Andean NCAs.

5.4.2 Red Centroamericana de Autoridades Nacionales Encargadas del Tema de Competencia

5.4.2.1 Origin and history

The Central American Integration System (SICA) was established on 1 February 1993 as an economic and political organisation of Central American states. In 2012, SICA established *Red Centroamericana de Autoridades Nacionales Encargadas del Tema de Competencia* (RECAC) – a Central American network of NCAs. This was possible after separate NCAs were established in all member states. RECAC is a successor of the Working Group on Competition Policy in the Central American Economic Integration, which was set up in 2006 by the economic ministries of five Central American countries. RECAC brings together the NCAs of countries with similar economies[140] that face similar economic and social problems.

136 OECD, Global Forum on Competition, Regional Competition Agreements: Benefits and Challenges, DAF/COMP/GF(2018)5, https://one.oecd.org/document/DAF/COMP/GF(2018)5/en/pdf (accessed 24 July 2021), p. 9.
137 J. Molestina, *Regional Competition Law*, p. 231.
138 J. Cortázar, 'Andean Competition Law', pp. 150–152.
139 J. Molestina, *Regional Competition Law*, p. 233.
140 All these countries have low gross domestic product, high market concentration and a very large shadow economy.

5.4.2.2 Legal basis

The legal basis for RECAC is provided by the Central American Network of Domestic Authorities in Charge of Competition's Operating Regulations.[141]

5.4.2.3 Network aims

RECAC constitutes a permanent mechanism to facilitate communication and cooperation among the Central American NCAs in relation to the matters in which they specialise, without prejudice to the future existence of a formally established regional competition body.[142] RECAC was established as a result of the decision of Central American governments to establish an informal forum to maintain contact, develop specific regional projects and share information about the cases they handle.[143] RECAC is also responsible for the implementation of the Central American Competition Regulation (RCC), approved by Resolution 441–2020 (COMIECO-XCIII) of the Council of Ministers of Economic Integration, which entered into force on 10 March 2021. The objective of this Regulation is to foster regional competition through cooperation and competition promotion mechanisms. The entry into force of the RCC implies the creation of the Central American Competition Committee.[144]

5.4.2.4 Membership

Today, the RECAC has six members: Costa Rica, the Dominican Republic, El Salvador, Honduras, Nicaragua and Panama. Guatemala has the status of an observer. The participating NCAs include ones which are independent of ministries (in the case of Nicaragua, Honduras and El Salvador); and ones which are totally dependent on the willingness and hierarchy of the economic ministries (in the case of Costa Rica and Guatemala).[145]

5.4.2.5 Internal organisation

RECAC has a rotating presidency. The role of *pro tempore* presidency is mainly administrative. Every meeting (physical or virtual) of RECAC is reported to the

141 See: Convenio suscrito RECAC, https://www.coprocom.go.cr/publicaciones/convenios/Convenio%20suscrito%20RECAC.PDF (accessed 24 July 2021).

142 OECD, Challenges Faced by Small Agencies and those in Developing Economies. Contribution from the RECAC, DAF/COMP/GF/WD(2017)27, p. 2, https://one.oecd.org/document/DAF/COMP/GF/WD(2017)27/en/pdf (accessed 24 July 2021).

143 P. Horna, *Fighting Cross-Border Cartels: The Perspective of the Young and Small Competition Authorities*, Oxford, Hart, 2020, p. 168.

144 Comisión para Promover la Competencia, Propuesta Proyecto de Presupuesto Ordinario 2022, https://www.coprocom.go.cr/acerca_coprocom/priorizacion_evaluacion/PROYECTO_Presup_ORDINARIO_2022.pdf (accessed 24 July 2021), p. 13.

145 P. Horna, 'Can Accountability and Effectiveness', p. 319.

Secretariat of the Central American Economic Integration Subsystem through the drafting of minutes.[146]

5.4.2.6 Forms of activity

RECAC describes itself as a permanent mechanism to facilitate communication and cooperation among the Central American NCAs in the areas in which they specialise, without prejudice to the future existence of a formally established regional competition body.[147] The network organises annual meetings (Central American Competition Forum), at which members may exchange views and prepare common proposals, as well as monthly technical videoconferences.

5.4.2.7 Network output

RECAC is primarily engaged in informal policy coordination and the exchange of experiences, as well as declarations after each annual forum. The network's activities focus mainly on strengthening NCAs and helping to create effective national competition rules in member countries. Disputes between NCAs and national trade ministries have been an obstacle to the adoption of common competition rules for the members of RECAC.[148] Currently, with the support of the Inter-American Development Bank, RECAC is implementing a project entitled: 'Diagnosis of competition conditions in air passenger transport in the Central American region and proposal of public policy for national application derived from the diagnosis.'[149] Despite endorsement from policymakers, RECAC failed to persuade Central American governments to adopt a common regional competition law.[150]

5.4.2.8 Forms and scope of cooperation

RECAC's activities mostly concern the formulation of public policy recommendations for national governments. RECAC has coordinated a number of technical assistance projects implemented by international organisations for the benefit of network members. In addition, RECAC's activities include the exchange of information and the organisation of conferences. RECAC is also the collective voice of its constituent bodies at the OECD and UNCTAD.

146 Ibid, p. 322.
147 OECD, Challenges Faced by Small Agencies and those in Developing Economies. Contribution from the RECAC, DAF/COMP/GF/WD(2017)27, p. 2.
148 M.A. Umaña, 'Regional Competition Arrangements: The Case of Latin American and the Caribbean', in P. Burnier da Silveira, W.E. Kovacic (eds), *Global Competition Enforcement*, p. 269.
149 Propuesta Proyecto de Presupuesto Ordinario 2022, p. 13.
150 P. Horna, *Fighting Cross-Border Cartels*, p. 169.

5.4.2.9 Network characteristics: summary

The network of NCAs that operates through RECAC is a formalised, open, horizontal network. The group's major objective was merely to establish a forum for discussion and the exchange of experiences that may be geared towards the institutionalisation of a regional competition authority in the future.[151] RECAC did manage to propose a common competition framework for the network. Commentators have pointed out that RECAC network members have been trying to harmonise practices through RECAC and have even proposed a regional institutional framework based on the commonality of cultural business values within the Central American countries.[152]

5.5 Other regional competition networks

To conclude this presentation of regional networks, it is worth mentioning two additional initiatives involving Southern and Eastern European countries. The first is the Sofia Competition Forum (SCF). The SCF is a joint initiative of the Bulgarian Competition Protection Commission and UNCTAD. On 11 July 2012, these bodies signed a memorandum of understanding[153] in which they established the SCF as an informal platform for technical assistance, the exchange of experience and consultation in the field of competition policy and enforcement. The NCAs of the Balkan countries of Croatia, Albania, Kosovo, Serbia, Bosnia and Herzegovina, Montenegro, Macedonia and Georgia joined the SCF by signing the Sofia Common Position on 12 November 2012.[154] The SCF seeks to promote cooperation and the development of regional ties in the Balkan region, thus ensuring the uniform application of competition rules. The SCF aims to assist countries in the region in adopting and enforcing competition law and maximising the benefits to these countries of well-functioning markets. In addition to the NCAs, the network involves cooperation with judges, academia and business. The SCF aims to provide a platform for NCAs in the region to exchange information and expertise in the field of competition policy; and to provide capacity-building support and advice on competition policy by organising seminars and workshops on competition law and policy. By maintaining an online platform for the publication of information, materials, presentations and webinars, the SCF seeks to further facilitate and develop cooperation between NCAs.[155] The SCF's activities include biannual conferences and the production of joint reports.[156]

151 P. Horna, 'Can Accountability and Effectiveness', p. 328.

152 P. Horna, *Problems in Multi-Jurisdictional Cartel Investigations and Some Ways to Tackle Them*, United Nations Sabbatical Leave Programme 2017, p. 41, https://hr.un.org/sites/hr.un.org/files/editors/u604/Problems%20in%20multi-juridictiojal%20cartel%20investigations.pdf (accessed 1 September 2021).

153 Memorandum of Understanding, http://scf.cpc.bg//uploads/data/scf_mem.pdf (accessed 1 March 2017).

154 Sofia Statement, http://scf.cpc.bg/uploads/data/Sofia_Statement.pdf (accessed 1 March 2017).

155 Sofia Competition Forum, http://scf.cpc.bg (accessed 1 March 2017).

156 Available at Sofia Competition Forum, http://scf.cpc.bg/?controller=pages&page_id=28 (accessed 1 March 2017).

The second forum, which has a similar composition, is the Southeast European Cooperation Process (SEECP). The members are Albania, Macedonia, Bulgaria, Turkey, Greece, Romania, Serbia, Montenegro, Bosnia and Herzegovina, Croatia, Slovenia and Kosovo. The aim of the SEECP is to transform the Balkans into an area of peace and cooperation, and to help the former socialist states of the region achieve membership of the North Atlantic Treaty Organization and the European Union. A distinctive feature of the SEECP is that it was formed on the initiative of the states of the region, without any external inspiration, and thus seeks to be the true voice of these states. The SEECP has no permanent structures and its activities are based on the organisation of annual meetings. The NCAs also meet once a year as part of the SEECP. On 25 May 2010, the NCAs of the SEECP signed an agreement mechanism for the exchange of information between them. Under this arrangement, each NCA has the right to send a request for information on the recipient's competition law and policy. The requested information must be provided within three months of receipt. However, the recipient may refuse the request on the grounds of protecting the confidentiality of the information requested.[157] There is no publicly available information on the intensity of cooperation within this network.

Apart from the networks analysed in this chapter, there are other networks in Latin America and the Caribbean, such as the Southern Common Market-MERCOSUR (Brazil, Argentina, Paraguay, and Uruguay); and the Caribbean Community-CARICOM[158] (Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, St Kitts and Nevis, Saint Lucia, St Vincent and the Grenadines, Suriname, and Trinidad and Tobago).[159]

5.6 Concluding remarks

Regional networks present the most diverse picture of TCNs. However, there are two basic difficulties surrounding the regional cooperation and networks of NCAs. First, there needs to be sufficient pollical will to pursue such cooperation. Second, NCAs should have been established to develop such cooperation.[160] Such networks usually mirror geopolitical links between countries; but these are not always enough for competition enforcement cooperation to develop, not to mention the

157 Agreement in the context of the South-East European Cooperation Process Memorandum concerning the mechanism for the exchange of information among Competition Authorities of the SEECP, Istanbul, 25 May 2010, https://www.epant.gr/en/Pages/Legislations (accessed 1 March 2017).

158 P. Horna, 'Can Accountability and Effectiveness', p. 314.

159 For an overview of CARICOM, please refer to T. Stewart, 'Regional Integration in the Caribbean: The Role of Competition Policy', in J. Drexl, M. Bakhoum, E.M. Fox, M.S. Gal, D.J. Gerber (eds), *Competition Policy,* pp. 161 ff.

160 E.M.M. Dabbah, *'The Regionalisation of Competition Law. A Future Role for the International Competition Network (ICN)?'* in P. Lugard, D. Anderson (eds), *The ICN at Twenty*, p. 115.

establishment of regional TCNs. Depending on the development of such links, TCNs may variously represent the most advanced forms of international cooperation among NCAs or the primacy of a political agenda over actual cooperation in the area of competition protection. It is striking how easy it is to establish a regional competition network, and at the same time how swiftly they may cease to exist. Everything depends on the existence of common interests among the NCAs that establish the network. Interestingly, no NCAs involved in these networks are eager to officially admit the dissolution of a network. Admission of such failure usually takes the form of the quiet deletion of information from the relevant websites. The establishment of regional networks often follows the political agenda of a particular NCA (as in the case of the MCF) or the particular ephemeral needs of a group of NCAs (as in the case of CECI). Once the primary reasons for establishing such regional competition networks are no longer valid, this usually adversely affects the operation and existence of the network.

The means of international cooperation among NCAs within regional competition networks reflects the development of competition laws in particular regions. This is especially visible in the case of Asia and South America. There are significant disparities among NCAs in relation to existing national competition regimes, as well as the legal and political possibilities to enforce rules in the case of rudimental international cooperation among NCAs. This is transposed to the functioning of regional competition networks. However, such networks should not be underestimated. Although they may not currently be an efficient tool in accelerating international cooperation, they have the potential to disseminate knowledge and provide training and tools for the development of national competition laws and their enforcement. Regional competition networks often rely on soft cooperation and practical efforts that are not necessarily reflected in official documents or documented in other forms. Therefore, regional competition networks present the greatest challenge to any researcher, as limited data is available for analysis.

Regional competition networks are good incubators for more advanced forms of international cooperation among NCAs (eg, continental and global networks). Regional networks may serve as an initial step for NCAs before joining larger networks. They may also serve as intermediaries through which a global network can provide assistance to regional groupings of NCAs (as in the case of the International Competition Network, OECD and UNCTAD technical assistance programmes).

6 Soft forms of international cooperation of competition authorities within networks

A perusal of the histories of national competition authorities (NCAs) reveals that international cooperation initially begins with soft cooperation. This does not require a clear and precise legal basis; nor does it lead directly to the imposition of any formal obligations on NCAs. Soft cooperation is the first stage of international cooperation between NCAs. It begins with the enactment and application of domestic competition legislation, and with the relevant bodies and their staff becoming acquainted with each other. This enables them to learn from more advanced competition jurisdictions and to exchange experience and expertise. Once a certain level of mutual trust and understanding has been established, and adequate domestic competition legislation has been enacted, the NCAs can move on to more sophisticated ways of working together. Trust and mutual understanding among not only NCAs but also agency officials are prerequisites for the more advanced forms of cooperation discussed in the following chapters.

6.1 Establishing contact and exchanging experiences

Establishing contact with a foreign counterpart is the first step in the development of international cooperation. Admittance to the network offers new members myriad possibilities to contact and learn from the other members. Some networks allow interested NCAs to observe the network's activities and to participate (as a third party) in some of these activities. It is always advisable first to learn about a club before joining one.[1] It is natural that a new member to the network may be keen to learn about and engage in network activities with the help of a particular member or members. By getting acquainted with network achievements and attending network meeting, new members can become fully aware participants in the wider community. This passive membership may soon evolve into more active engagement in the form of soft cooperation.

Soft cooperation may encompass the following kinds of joint activities:

1 This is especially true in the context of the plurality of networks that are functioning today.

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- the exchange of experience and expertise at meetings, workshops, seminars and conferences, which enables connections to be made and acquaintances to be formed in bigger or smaller forums. Such exchanges can cover the most basic and mundane matters, as well as more advanced issues, depending on the needs and interests of the parties involved. Moreover, an NCA might hold conferences and seminars to signal its openness to its peers in other countries;
- the exchange of publicly available information and the sharing of general results of domestic administrative practice. This need not involve face-to-face meetings and can include providing assistance in solving specific problems and information on established administrative practice; and
- study visits, which result in the staff of NCAs becoming acquainted with each other. These provide opportunities to become familiar with the work of other NCAs and to see how administrative procedures are conducted.

These activities are directed towards enhancing mutual understanding. They allow the engaged NCAs to reflect on their own legal rules, administrative practice and professional experience. This may improve their competence and capacity to undertake their tasks; and may encourage them to play a more active role in the network – as not only recipients but also creators of the network's output.

Some networks (eg, the International Competition Network (ICN)) offer outreach or training-on-demand programmes. These aim to provide comprehensive training to new NCAs or new employees of existing network members. Such training may be very beneficial, as it is usually prepared by the other NCAs and it is based on actual experience and cases. Despite differences in substantive and procedural law, some issues – such as case management, investigative techniques and understanding of common competition concepts – are universal and may be easily passed on from one NCA to another.

6.2 Cooperation connected with establishing legislative aims and standards, and coordinating administrative practice (soft law)[2]

Creating institutionalised forms of cooperation by setting up official or unofficial networks and concluding bilateral or multilateral agreements lends a sense of permanence to such cooperation and provides opportunities to deepen it. Several stages may be discerned from the evolution of these forms. The second step, after becoming acquainted and exchanging experience and expertise, most often involves negotiating broad cooperative frameworks and ground rules which are acceptable to all participating agencies (eg, the ICN, European Competition Authorities, the Central European Competition Initiative and the EU Merger Working Group) and laying the foundations for further activity. The next stage typically involves compiling reports, commissioning studies and comparing

2 This subchapter is based on M. Błachucki, 'The Role of Soft Law in Functioning of Supranational Competition Networks', *CC&EEL*, iss. 1(133), 2019, pp. 33–42, DOI: 10.37232/cceel.2019.03.

domestic administrative regulations and practices. Those networks that have been created in an orderly manner can be distinguished from those based merely on the exchange of experience and expertise, in that they highlight areas of disagreement and encourage the production of more detailed joint documents in selected areas. These can differ in nature – for example, the ICN has produced numerous manuals and handbooks to assist in administration (eg, procedural manuals, workbooks, market surveys, templates and toolkits) and model documents (eg, waivers of confidentiality and agreements with trustees and other fiduciaries).

Soft law documents – such as recommendations, best practice handbooks, standards and guidelines, and other agreed principles – are produced in addition to documents that directly support administrative practice under the umbrella of international cooperation between competition agencies. It is difficult to overestimate the value of these documents. Although they are not officially binding, their relevance and persuasive authority are crucial for the development of the administrative practice of many NCAs, and for subsequent amendments to domestic regulations. Soft law documents created through international cooperation enable NCAs to learn new tools, practices and principles. They can then seek to apply these in order to remain fully fledged participants. Furthermore, mutual principles that have been agreed through an international forum constitute a compelling argument for legislative amendments at the national level. At the same time, soft law is a broader issue that assumes particular importance in the context of transnational competition authorities and their activities (especially the European Commission).

The soft law documents laid down by transnational competition networks (TCNs) play a dominant role in international competition law. The universality of these regulations is such that other soft law policies and principles – for example, those determined by private entities[3] – play only a marginal role (as opposed to other regulatory areas and the evolving detailed transnational soft law conventions/acts described in codes of good practice).[4] Soft law is a practical and theoretical challenge for jurisprudence. The sheer wealth and heterogeneity of material available make it inordinately difficult to formulate a uniform and comprehensive definition. Soft law is most commonly understood as comprising informal rules that can generate certain practical results despite not having the force of law.[5] Soft law is often created by TCNs without any direct legal basis. The effectiveness of informally created transnational law, including soft law, depends on cross-border cooperation on the part of national administrative authorities, as well as the

3 The best example is the failure of the so-called Munich Code. For more details see D.J. Gifford, 'The Draft International Antitrust Code Proposed at Munich: Good Intentions Gone Awry', *MJGL*, vol. 6, iss. 1, 1996, pp. 1 ff.

4 D. M. Bowman, G.A. Hodge, 'Counting on Codes: An Examination of Transnational Codes as a Regulatory Governance Mechanism for Nanotechnologies', *R&G*, vol. 3, iss. 2, 2009, pp. 159 ff, DOI: 10.1111/j.1748-5991.2009.01046.x.

5 A. Jurcewicz, 'Rola "miękkiego prawa" w praktyce instytucjonalnej Wspólnoty Europejskiej', in C. Mik (ed), *Implementacja Prawa Integracji Europejskiej w Krajowych Porządkach Prawnych*, Toruń, TNOiK, 1998, p. 111.

possible contribution of non-governmental actors and non-governmental organisations (NGOs) (this is an aspect of the informality of the creation of law). Moreover, this must take place in forums other than conventional international organisations and/or between entities other than those of conventional diplomatic relations – for example, regulatory authorities or government agencies (this is an aspect of the informality of the contributing entities). Finally, this cooperation does not typically result in the adoption of formal conventions, agreements or other legally binding obligations (this is an aspect of the informality of the results of cooperation).[6] Soft law appears in many branches and fields of law, although its development has been particularly pronounced in public international law – especially in relation to issues such as disarmament, the international economic order, the international monetary order, environmental protection and human rights.[7] Soft law is also considered typical of the development of competition law.[8] Soft law features in international trade, where countries have acknowledged the advantage of informal soft agreements over those that create rigid obligations and require formal ratification.[9] The fact that soft law is now used in international and transnational trade to obviate the role of national governments and circumvent their exclusive authority to establish legal regulations may seem ironic. TCNs have largely supplanted national governments in this sphere of legislative activity by creating their own procedural rules. As a result, the boundary between public and private has become blurred in many places.[10]

Soft law is used to strengthen the role of supranational organisations. TCNs can substantially contribute to the escalation of this process. For example, EU state aid law developed when the member states, through representatives sitting on the European Council, could not bring themselves to accept any hard law regulations. The European Commission took the initiative and, through soft law, guided the development of this branch of law; and in so doing, ensured its eventual harmonisation.[11] The European Commission uses soft law to advance soft harmonisation among member states; and by presenting an authoritative and official

6 J. Pauwelyn, 'Informal International Lawmaking: Framing the Concept and Research Questions', in J. Pauwelyn, R. Wessel, J. Wouters (eds), *Informal International Lawmaking*, Oxford, OUP, 2012, p. 22.

7 P. Skuczyński, '*Soft law w perspektywie teorii prawa'*, in O. Bogucki, S. Czepita (ed), *System prawny a porządek prawny*, Szczecin, Publishing House of USz, 2008, p. 326.

8 M. Błachucki, 'Stanowienie aktów tzw. prawa miękkiego przez organy administracji publicznej na przykładzie prawa antymonopolowego', in M. Stahl, Z. Duniewska (eds), *Legislacja administracyjna. Teoria, Orzecznictwo, Praktyka*, Warsaw, WK, 2012, pp. 236–237.

9 M. Cini, 'From Soft Law to Hard Law? Discretion and Rule-making in the Commission's State Aid Regime', *EUI RSCAS Working Paper*, no 35, 2000, p. 4.

10 K. Sahlin-Andersson, 'Emergent Cross-sectional Soft regulations. Dynamics at Play in the Global Compact Initiative', in U. Morth (ed), *Soft Law in Governance and Regulation. An Interdisciplinary Analysis*, Cheltenham, Edward Elgar Publishing, 2004, pp. 130–131.

11 M. Blauberger, 'From Negative to Positive Integration? European State Aid Control Through Soft and Hard Law', *MPIfG Discussion Paper*, iss. 4, 2008, p. 13.

interpretation of EU law, it gradually takes over areas that were hitherto considered to be reserved for EU legislative bodies. Given the conflicting interests of member states, loosely worded TFEU provisions have proved decisive in ensuring the success of the European Commission.[12] The adoption of soft law precedes the adoption of law; European state aid law is a case in point. Crucially, this is an example of how soft instruments are gradually supplanted by hard ones.[13] An analysis of selected transnational administrative networks reveals that the involvement of national agencies considerably shortens the odds of legal regulations drawn up or deemed essential in the network forum being adopted. The additional conclusion of bilateral agreements between national agencies and agencies from leading jurisdictions increases the probability of foreign standards being incorporated into domestic legal frameworks.[14]

The abovementioned observations equally apply to soft law created within the European Competition Network (ECN). ECN resolutions (including those concerning independence and appropriate measures) and recommendations (including those concerning leniency and priorities) have been codified and developed in the ECN+ Directive. The ECN has come to advocate 'soft harmonisation', and the results have been very positive. The European Commission acknowledges, however, that the next stage should involve the transfer of these consensual standards to the EU legal system as hard law. The strengthening of national, ECN and especially EU competition authorities is the intended end result of these changes. The position of NCAs has been strengthened *vis-à-vis* that of national governments, to the extent that the ECN – and especially the European Commission – can expand their influence on not only the jurisdiction, but also the institutional settings of EU NCAs.

Soft law instruments take a multiplicity of forms and can therefore fulfil a variety of functions. Three basic functions can be identified under EU law:

- The pre-law function can be understood in two ways:
  - a as a soft law act that is consultative in nature, published with a view to canvassing the opinions of interested parties, and subsequently enacted as a universally binding law on that basis; and
  - b more broadly, as a soft law instrument adopted to possibly pave the way for the future enactment of hard law.
- Soft law supplements the post-law function – that is, it is negotiated after universally binding regulations have been adopted with a view to supplementing and consolidating them. In this situation, the universally binding regulations anticipate the drafting of soft law documents.

12 Ibid, p. 22.
13 M. Cini, 'From Soft Law', p. 26.
14 D. Bach, A. Newman, 'Transgovernmental Networks and Domestic Policy Convergence. Evidence from Insider Trading Regulation', *International Organization*, vol. 64, iss.3, 2010, p. 507.

- Soft law supplants the para-law function – that is, it can be an alternative to conventional legislation. One example of this might be programmatic documents of a prospective nature (eg, policies of various kinds).[15]

The soft law documents negotiated through TCNs provide a clear example of the fulfilment of these functions. The soft law documents adopted in these forums frequently serve as templates for national and even supranational (especially EU) legislatures. The soft law of these networks additionally supplements national hard law. Indeed, many soft law instruments contain recommendations and other guidelines that regulate certain issues in a more detailed manner than national statutes, where they are normally defined in very general terms. This is certainly the case with competition law, where soft law can be applied at both the national level (where it is adopted by NCAs) and the transnational level (where it is adopted by TCNs). Moreover, the soft law of TCNs can replace hard law in some cases – especially when a given country lacks the political will to regulate a particular issue. The 2014 Organisation for Economic Co-operation and Development (OECD) Recommendation on international cooperation in competition matters may be a case in point. Faced with a lack of political will to create a binding international convention along the lines of the OECD taxation conventions, the relevant TCN members decided to accept this recommendation. This demonstrates that soft law enacted by TCNs can complement, or even supplant, binding national legal standards, as well as international public law, in some situations.

It is also worth considering the way(s) in which soft law instruments negotiated by TCNs can be reflected in a national legal system, and how they can guide an NCA in exercising its administrative jurisdiction. As noted above, although unofficial transnational standards are not binding, they nevertheless bring about practical results and influence universally binding national and international law. It is emphasised in the literature that unofficial transnational standards (ie, soft law negotiated by networks) can be included in national law through:

- incorporation into transnational standards in toto without any special oversight;
- specific references to specific transnational standards in legal documents;
- transnational standards being commonly referenced or treated as general principles (eg, as good industry practices or best available technologies);
- the application of designated provisions to make transnational standards one of the (non-binding) bases of published decisions;
- the employment of transnational standards as guidelines for interpreting national regulations governing ill-defined concepts; and
- the direct application of transnational standards by private parties in civil law relationships.[16]

15 L. Senden, *Soft Law in European Community Law*, Hart, Oxford 2004, p. 120.

16 O. Dilling, M. Herberg, G. Winter, 'Introduction. Exploring Transnational Administrative Rule-Making', in O. Dilling, M. Herberg, G. Winter (eds), *Transnational Administrative Rule-Making. Performance, Legal Effects, and Legitimacy*, Oxford, Hart, 2011, pp. 5–6.

Polish law provides some excellent examples as to how the above influences are reflected in administrative practice and in the judgments of civil and administrative courts. The Telecommunications Law[17] (Article 3(3)) directly refers to the application of soft law on the part of NCAs; and civil courts competent in competition cases cite mutually agreed transnational practices in their judgments.[18]

The institution of soft law may be a sign that the law is being modernised; but it can also be an attempt to circumvent conventional and official legislative processes. Soft law is associated with the following risks:

- It can encroach on established law-making processes;
- It can bypass legislatures;
- Its substance can be imprecise and unwarranted;
- It is not fully embedded in positive law;
- It does not readily lend itself to judicial evaluation;
- Very little soft law is publicly available and its creation is not influenced by public opinion; and
- It enables judges and administrators to assume a dominant role in creating public policy.[19]

These risks vary in nature and extent, but they mostly result from soft law being embedded in the legal system before universally binding legal regulations have been created to govern it. Most of these risks can be avoided by adopting explicit procedures to create and monitor soft law instruments. The development of soft law constitutes incontrovertible evidence that NCAs have exceeded their remit to apply the law and have begun to create it in certain areas. These risks are increasing in the case of soft law established by TCNs. The practice of the Polish Office of Competition and Consumer Protection (OCCP) proves that it is acting independently of other national public administrative agencies and ministries by participating in the creation of soft law as part of a competition network. Its operations in this domain are neither specified anywhere in the law nor subject to any judicial or administrative oversight whatsoever. Moreover, when they create soft law instruments, TCNs generally define the adoption procedures themselves and do not, as a rule, subject them to any external oversight. Adopting soft law instruments as part of a TCN can impact on, and even go beyond, statutory matters governed by Polish law. While the documents are generally accessible online, very few of them are available on the OCCP's website, even though it was involved in drafting them.

Soft law created by TCNs has sparked a great deal of serious controversy – especially over the legitimacy of these bodies to create such regulations and the insertion of this kind of quasi-normative legislative act into national legal systems.

17 Telecommunications Law of 21 July 2000, JoL 2000, no 73, item 852.
18 M. Błachucki, 'Judicial Control of Guidelines on Antimonopoly Fines in Poland', *C&R*, iss. 25, 2016, pp. 57 ff.
19 M. Cini, 'From Soft Law', p. 5.

Soft law instruments are rarely created by TCNs in accordance with any clear rules. At times, there is only a 'recognised standard of competence' (eg, that accorded to the OECD) to warrant their adoption. They are very rarely adopted pursuant to a regulated procedure. These instruments are almost never overseen by independent courts or even other NCAs. This lack of legitimacy and oversight can be resolved by involving third parties in the adoption of soft law instruments (in respect of which the agreed rules will apply). In principle, such involvement should lend these documents a certain degree of legitimacy and ensure that both government agencies and third parties proceed in accordance with them. This practice is employed by the ICN, which involves non-governmental advisers in its activities, giving them the opportunity to influence the substance of soft law instruments adopted by TCNs associated with the ICN. The OECD likewise allows third parties to articulate their requirements when drawing up its recommendations. However, many competition networks – especially in Europe – create soft law instruments through highly opaque procedures.

6.3 Verification of compliance with common standards on the part of network members

Both networks that operate as part of international organisations (eg, the OECD and the United Nations Conference on Trade and Development (UNCTAD)) and those that work together informally (eg, the ICN) often establish mechanisms to verify whether and to what extent their standards are being applied; and to monitor progress in the implementation and harmonisation of national legal regulations and practices. However, often these mechanisms are selective or ineffective. The weakness of informal networks lies in fact that the practices of their members are seldom monitored for compliance with network standards.[20] This is what makes mechanisms for verifying such compliance so important. These can take the simple form of requiring NCAs to complete regular surveys and questionnaires or to conduct periodic self-assessments and compile reports. Peer reviews – that is, periodic evaluations conducted by other NCAs – and assessments conducted by outside experts fulfil a similar function. This verification serves to monitor the compliance of national competition regulations and practices with accepted international standards, and to motivate NCAs to further harmonise their regulations and practices therewith. In certain areas, repeated surveys reveal a gradual increase in compliance with at least some TCNs recommendations and best practices.[21] Informal pressure from an organisation or international network can be a strong argument for legislative amendments.

20 S. Van Uytsel, 'The International Competition Network, Its Leniency Best Practice and Legitimacy: An Argument for Introducing a Review System', in M. Fenwick, S. Van Uytsel, S. Wrbka (eds), *Networked Governance*, pp. 217 ff.

21 D. Anderson, P. Culliford, 'Surveying the Surveys: The Drive for Implementation of the ICN's Recommended Practices for Merger Notification and Review Procedures', in P. Lugard, D. Anderson (eds), *The ICN at Twenty,* pp. 280 ff. It is interesting that such repeat surveys are conducted only by some of working groups of the ICN.

The surveys and questionnaires that TCNs distribute to members can serve many aims. It is obviously essential to gather information from every member on a given topic, which can form the basis of a database or determine the state of the administrative regulations or practices of members in a given area. These databases can significantly contribute to the network's effectiveness by making information about the national legal systems of members available to anyone potentially interested. They can be encountered in the practices of, for example, the ICN,[22] UNCTAD,[23] the OECD[24] and, to a lesser extent, the ECN.[25] Unfortunately, the fundamental problem with these databases (regardless of the network) is that they are seldom if ever systematically and regularly updated and verified. Many networks distribute questionnaires with the further objective of establishing the status of national regulations and practices capable of serving as a basis for drafting joint reports, compiling lists of best practices and/or setting guidelines in given areas. TCNs can also encourage, or (less frequently) oblige, NCAs to conduct self-assessments and submit reports – for example, OECD NCAs are obliged to do so. Annual reports chiefly serve to collect timely information on changes to a country's competition laws and policies, as well as its NCA's efforts and commitments; but at the same time, they reveal the level of compliance with organisational guidelines in particular areas. The periodic and *ad hoc* self-assessments of NCAs serve this sole purpose. While NCAs invariably produce high-quality annual reports, there is seldom any evidence of similar conscientiousness in their periodic and incidental self-assessments. National annual reports can also be put to internal use. Some NCAs post the reports they submit to TCNs online.[26] To a

22 For example, the ICN makes available databases containing summaries of national regulations in the following areas: concentration control – http://www.internationalcompetitionnetwork.org/working-groups/current/merger/templates.aspx; cartels – http://www.internationalcompetitionnetwork.org/working-groups/current/cartel/templates.aspx; the exchange of information on cartels – http://www.internationalcompetitionnetwork.org/working-groups/current/cartel/ism.aspx; and selected legal issues on the abuse of dominant position – http://www.internationalcompetitionnetwork.org/working-groups/current/unilateral/questionnaires-responses.aspx (accessed 1 March 2018).

23 For example, UNCTAD makes available a database containing the following information: translations of selected competition statutes – http://unctad.org/en/Pages/DITC/CompetitionLaw/National-Competition-Legislation.aspx; and descriptions of selected national competition protection systems – http://unctad.org/en/Pages/DITC/CompetitionLaw/ccpb-PubsPage04.aspx (accessed 1 March 2018).

24 For example, the OECD makes available databases in the following areas: international cooperative agreements on competition protection – https://www.oecd.org/daf/competition/inventory-competition-agreements.htm; and memorandums of understanding between NCAs on issues in cooperating on competition protection matters – https://www.oecd.org/daf/competition/inventory-competition-agency-mous.htm (accessed 1 March 2018).

25 The ECN mostly publishes documents related to this. The ECN website contains links to the reports of NCAs – http://ec.europa.eu/competition/ecn/annual_reports.html; and sites containing current information on the operations of NCAs – http://ec.europa.eu/competition/ecn/news.html (accessed 1 March 2018).

26 For example, Hungarian Competition Authority, Submissions prepared by the GVH for the Competition Commission of the OECD, http://www.gvh.hu/en/gvh/ana

lesser extent, these include incidental reports and self-assessments. This may be due to a reluctance to reveal any discrepancies between international guidelines and national regulations; or because they had little involvement in, or commitment to, the network's additional operations. The functions and operations of the networks described here are not uniform; and although they are frequently applied, there are no codified regulations in this sphere.

Peer reviews are regulated to a greater extent and are a permanent feature in the toolbox of transnational networks in general[27] and TCNs in particular. This tool is known in international law and is applied internationally. Moreover, peer reviews are increasingly frequently employed by international organisations, as they are deemed to be an effective means of exerting influence on individual countries and bringing national policies into line with international standards.[28] A peer review involves the assessment of one country – or a national authority charged with administering a particular area of law – by another country or other administrative authorities. The selected legal area is assessed by an international organisation, another government or another national administrative authority on behalf and at the behest of an international organisation or a network that coordinates the functions of its members. Their non-adversarial nature and reliance on mutual trust and cooperation are important aspects of peer reviews.[29] In practice, these surveys are entrusted to foreign national administrative bodies which are responsible for the functions being reviewed. A peer review involves perusing documents and interviewing representatives of the government or agency being evaluated, as well as third parties. The peer review should be conducted in the jurisdiction being assessed. The primary purpose is to evaluate the compliance of national regulations, policies and practices with international standards.[30] Networks such as the OECD[31] and UNCTAD[32] make their peer review reports public.

The basic aim of a peer review is to ensure that national regulations comply with the transnational network's standards.[33] This aim is served by the formal and informal recommendations that come out of the review. On completion, the

lyses/oecd_submissions (accessed 1 March 2018). For its part, the Polish OCCP has never shown any interest in making its reports available.

27 Y. Svetiev, *Experimentalist Competition Law*, p. 97.

28 E.R. McMahon, K. Busia, M. Ascherio, 'Comparing Peer Reviews: The Universal Periodic Review of the UN Human Rights Council and the African Peer Review Mechanism', *African and Asian Studies*, vol. 12 iss. 3, 2013, pp. 286–287.

29 *Peer Review. An OECD Tool for Co-operation and Change*, Brussels, OECD, 11 September 2002, p. 9.

30 G. Dimitropoulos, 'Compliance through Collegiality. Peer Review in International Law', *MPILux Working Paper*, no 3, 2014, p. 20.

31 OECD, Country Reviews of Competition Policy Frameworks, https://www.oecd.org/competition/countryreviewsofcompetitionpolicyframeworks.htm (accessed 1 March 2018).

32 UNCTAD, Voluntary Peer Review of Competition Law and Policy, http://unctad.org/en/Pages/DITC/CompetitionLaw/Voluntary-Peer-Review-of-Competition-Law-and-Policy.aspx (accessed 1 March 2018).

33 G. Dimitropoulos, 'Compliance through Collegiality', p. 40.

subject country is sometimes offered technical assistance. However, the significance and effectiveness of a peer review mainly depend on the pressure it can bring to bear.[34] This pressure stems from the impact of the review, combined with its persuasive power. It does not find expression in any legally binding mechanisms, such as injunctions or sanctions, but rather relies on gentle persuasion. In particular, review pressure can be felt through:

- the application of various measures, such as formal recommendations and informal dialogue through the network;
- a public assessment of the outcome of the review, sometimes combined with a country-by-country comparison and even a 'league table' ranking the compliance of individual countries against the international standards recognised by the network; and
- the influence of these measures on public opinion, public administrators, and government decision-makers in the countries concerned.[35]

However, despite their inherent potential to influence countries and NCAs, peer reviews are not always effective. Virtually every TCN makes use of them. The OECD and the World Trade Organization (WTO) have the most advanced and highly developed means of conducting peer assessments. A comparison of these two networks reveals that WTO reviews are very general and have no effect on competition policy; while OECD reviews are strictly limited to verifying the compliance of a national policy with previously accepted recommendations.[36] WTO peer reviews are considered ineffective on account of the generality of their reports and the lack of transparency in preparing them.[37] The procedure is often accompanied by political pressure, which influences the outcome. Moreover, the WTO lacks the suitably qualified staff and adequate material resources required to conduct comprehensive, multi-purpose peer reviews.[38] OECD peer reviews have likewise attracted criticism. Commonly cited weaknesses include their excessively conservatively worded prescriptions; their watered-down recommendations (presumably to pre-empt accusations of having trespassed on the domain of national governments); the lack of transparency in their preparation; and the disproportionately significant contribution of the OECD Secretariat to their creation.[39] At the same time, however, the ineffectiveness of peer reviews with respect to some countries may be due to an underdeveloped

34 *Peer Review. An OECD Tool*, p. 10.
35 Ibid.
36 *Peer Review. Merits And Approaches in a Trade and Competition Context*, Brussels, OECD, 2002, pp. 22–23.
37 V. Zahrnt, 'The WTO's Trade Policy Review Mechanism: How to Create Political Will for Liberalization?', *ECIPE Working Paper*, no 11, 2009, pp. 20–21.
38 Ibid.
39 M. Lehtonen, 'Environmental Policy Integration through OECD Peer Reviews: Integrating the Economy with the Environment or the Environment with the Economy?', *Environmental Politics*, vol. 16, iss. 1, 2007, pp. 31–32.

political culture. Here, the 'rationale' deemed most cogent is *argumentum ad baculum* (eg, the threat of having hard obligations or sanctions imposed), and not gentle persuasion.[40] Against this background, UNCTAD peer reviews of competition law are rated very positively. This success is measured by the efforts of particular countries to implement the recommendations that come out of these reviews. UNCTAD peer reviews should be more extensively linked with technical support and other means of assistance, and better coordinated with the measures applied by other international organisations. They should also include a mechanism for conducting a mandatory follow-up peer review after a specified period in order to assess the number of recommendations actually implemented.[41]

Peer reviews are essential from the standpoint of the network, as they link the consensus that accompanies the adoption of joint standards to their implementation. They can potentially be converted into a vital means of administrative control – however weak a control mechanism they may seem from a technical viewpoint. This is because they can alter the context of national regulations by breaking down national particularisms in favour of increasing reciprocity and accountability in the relations between national administrative agencies. This occurs in situations where more mutual benefits flow from following common standards and strengthening cooperation between international bodies.[42] Moreover, peer reviews are seen as a form of global governance in which administration and regulation do not take the form of hierarchical relationships, but are horizontal relations that bind parties of equal status. They expand and promote forms of governance based on self-management and increased efficiency, and not directives and sanctions.[43]

6.4 Concluding remarks

Soft cooperation is universal by nature. It can take place inside formal transnational administrative networks or as a standalone and incidental form of international cooperation. It can be permanent (eg, twinning programmes), recurring (eg, periodic meetings) or ad hoc. This sort of cooperation predominantly results in gaining knowledge and experience; although becoming familiar with other government bodies and their officials is no less important. It enables the mutual trust essential for effective cooperation to be established. Soft cooperation does not directly translate into administrative jurisdiction being exercised by NCAs; but

40 Poland is a prime example of the alarming state of affairs in this area. See M. Błachucki, 'The Role of the OECD', pp. 189 ff.

41 L.V. Melikyan, *External Evaluation of UNCTAD Peer Reviews on Competition Policy*, UNCTAD, New York–Geneva 2015, pp. 35–36, http://unctad.org/en/PublicationsLibrary/ditcclp2014d5_en.pdf (accessed 11 August 2018).

42 M.J. Washington, 'The Practice of Peer Review in the International Nuclear Safety Regime', *New York University Law Review*, vol. 72, 1997, p. 464.

43 G. Dimitropoulos, 'Global Administrative Law as "Enabling Law": How to Monitor and Evaluate Indicator-Based Performance of Global Actors', *IRPA Working Paper,* no 7, 2012, pp. 28–29.

it does have an indirect impact as a result of greater knowledge and experience on the part of the officials charged with applying the regulations.

Means of soft cooperation should not be underestimated. For example, without ways to establish contact and inform each other about matters of mutual interest, actual cooperation among NCAs would be much harder. Although informal cooperation does not involve any binding administrative actions, it may still be effective in many cases. The main obstacles are improper implementation by NCAs of obligations relating to informal cooperation and sometimes the lack of mutual trust and will to assist each other. To a large extent, the success or otherwise of informal cooperation is down to the leadership of particular NCAs. When there is a visible commitment to international cooperation on the part of the executives of NCAs, informal cooperation will flourish. Otherwise, it will remain a false promise. TCNs and reputation building within them may be an effective remedy for many NCAs against such failures.

Soft cooperation within TCNs has a significant impact on domestic administration. As is explained in the literature, such cooperation within networks increases the nominal convergence of provisions and enhances the administrative practice of NCAs engaged in such cooperation. Furthermore, soft cooperation increases the capacity of national administrations (ie, NCAs) thanks to the technical assistance and training offered by networks.[44] This proves that even soft cooperation has the potential to transform national competition enforcement systems. Last but not least, soft cooperation is usually a first step towards developed and enhanced cooperation. The basic condition for soft cooperation is the establishment of mutual trust and respect – not only between NCAs, but also between people. It is true that cooperation can mean networks of authorities lead to networks of people.[45] But without people who know and trust each other, even the most sophisticated cooperation mechanism will not work.

44 D. Bach, A. Newman, 'Transgovernmental Networks', p. 510.

45 S. Calkins, 'Reflections on International Cooperation', in M. Błachucki (ed), *International Cooperation*, p. 20, DOI: 10.5281/zenodo.5011848.

7 Developed forms of international cooperation of competition authorities within networks

The exchange of experience, the formation of acquaintances among national competition authorities (NCAs) and their staff, the adoption of common standards, and the coordination of guidelines and practices are not ends in themselves, but predominantly serve to enhance the qualifications of NCAs and their staff, and to improve the public enforcement of competition law. Exercising competition jurisdiction requires developed international cooperation between NCAs. Developed cooperation has gradually evolved into regular international cooperation among NCAs. Transnational competition networks (TCNs) are important facilitators of such cooperation and provide assistance in, and often frameworks for, sustaining selected or all forms (depending on the type of network) of developed cooperation for members. Many NCAs have taken on a huge workload connected with exercising administrative jurisdiction within an international framework in order to comply with international recommendations and guidelines. This chapter analyses developed forms of cooperation of NCAs within networks. Two main categories of cooperation activities are discussed, depending on whether such cooperation affects the rights or obligations of the parties or of other participants to the competition proceedings.

7.1 International cooperation of NCAs that does not affect the rights or obligations of the parties or other participants to the competition proceedings

The first category of NCA activities, which is analysed in this section, comprises administrative actions that do not directly affect the rights and obligations of those to whom the legal activities are addressed. In principle, these do not require a particular universally binding legal basis, but are undertaken on the basis of the general jurisdictional norm establishing competition jurisdiction and enabling the NCA to cooperate internationally on competition matters. While these administrative actions do not affect the rights or obligations of the parties or other participants to the competition proceedings, they can be relevant to the way in which the proceedings are conducted and can influence international cooperation in a given case.

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7.1.1 Establishing contact points for international cooperation

The organisational preparation of NCAs is a necessary precondition for effective international cooperation. The first step is to designate someone to handle this. However, if foreign partners are unaware that an NCA has appointed such a person, this may prove insufficient in itself. It is essential that foreign partners be directed immediately to the designated person; there is no guarantee that a telephone call to the switchboard or a message to the general email address will reach that person. People and/or internal units with overall competence for foreign contacts can be designated; as can people responsible for foreign contacts in relation to particular types of conduct, transactions and issues. The role of contact points is to establish communication with the competent person from another NCA as quickly as possible.

Designating a contact person is of major importance to the European Competition Network (ECN). The ECN is an official administrative network within which the European Commission has created a complete cooperation infrastructure. The exchange of information and notifications of cases and decisions are all effected through a secure network. Every NCA has an authorised disclosure officer (ADO) who is responsible for authorising staff from NCAs to access ECN databases, and to whom all encrypted correspondence is directed. The ADO also maintains a general contact point for all ECN correspondence. In addition, representatives of NCAs in ECN working groups are presumed to function as contact points for matters that fall within the remit of the working group. The EU Merger Working Group (MWG) also benefits from the ECN's technical infrastructure. As an EU MWG member, the Polish Office of Competition and Consumer Protection (OCCP) is a contact point for other members on merger control matters.

Virtually every TCN stresses the importance of contact points. Following the 2014 Organisation for Economic Co-operation and Development (OECD) Recommendation on international cooperation in conducting competition investigations and proceedings (Article X(2)), every OECD country has appointed its own contact points for this purpose. Pursuant to this recommendation, OECD countries have been using their designated contact points to forward information and ask and respond to questions as part of their administrative practice. Similarly, the International Competition Network (ICN) members participating in frameworks (mergers, information sharing and ICN Framework for Competition Agency Procedures) are asked to establish contact points.

The designation of special officers who are responsible for cooperation has greatly facilitated direct contact in conducting administrative proceedings, and especially in examining the same issues in different countries. If the contact points additionally participate in international meetings, then these contacts – now buttressed by personal acquaintances – are all the more straightforward. Also significant is that most TCNs (eg, European Competition Authorities (ECA), the ECN, the EU MWG, ICN, the OECD) maintain and update their own lists of contact points.[1] This means

1 For example OECD, Contacts for Notifications Pursuant to the 2014 Recommendation of the Council concerning International Co-operation on Competition

that the network itself informs all members of any changes to the list – rather than NCAs themselves individually distributing information about appointing or changing their contact points.

7.1.2 Informing foreign NCAs about the initiation of proceedings

International cooperation between NCAs relies on the flow of information. NCAs can work together effectively if they know that at least one other NCA is conducting proceedings on a case that is pending before them or that concerns their jurisdiction. This applies to cases involving anti-competitive practices as well as merger control. Each TCN encourages its members to forward information which is relevant to other members as soon as possible. This especially applies to information about the initiation of proceedings of possible interest to other jurisdictions, as cooperation can then commence at the initial stage. This sort of notification constitutes the essence of administrative networks. This follows from the fact that the initiation of proceedings by one network member can influence another NCA's decision on whether to commence, stay or discontinue proceedings. The idea behind the development of information notices on the initiation of proceedings is that this allows individual NCAs to work with each other when reviewing the same merger transaction, with the aim of achieving a consistent and coherent assessment and outcome, while also reducing transaction costs and the administrative burden.[2] Information networks such as the OECD also recommend members to notify investigations.[3] Moreover, such notifications are regularly used by OECD members.[4]

The ECN is an administrative network which aims to decentralise the application of the European competition provisions. Its primary and original goals were to notify members about cases and to exchange information.[5] The ECN has evolved over time, but these basic goals remain today. Notifying members of every case in which Treaty provisions are applied is a precondition for effective ECN cooperation; but above all, it ensures that Treaty standards are uniformly applied. Article 11(3) of Regulation 1/2003/EC states:

2 R. Prates, R. Bayão Horta, 'Cooperation in Multijurisdictional Merger Filings', p. 181.

3 Section V of the 2014 Recommendation of the Council concerning International Co-operation on Competition Investigations and Proceedings 'recommends that an Adherent should ordinarily notify another Adherent when its investigation or proceeding can be expected to affect the other Adherent's important interests'.

4 The OECD states that '88% of Adherents are making active use of notifications of their competition proceedings to other jurisdictions, and they find them useful' – OECD, International Co-operation on Competition Investigations and Proceedings: Progress in Implementing the 2014 OECD Recommendation https://www.oecd.org/daf/competition/international-cooperation-on-competitioninvestigations-and-proceedings-progress-in-implementing-the-2014-recommendation.htm (accessed 31 June 2022), p. 41.

5 P. Lægreid, O.C. Stenby, 'Europeanization and Transnational Networks', p. 16.

> the competition authorities of the Member States shall, when acting under Article 81 or Article 82 of the Treaty, inform the Commission in writing before or without delay after commencing the first formal investigative measure. This information may also be made available to the competition authorities of the other Member States.

The notification system is managed through a database to which all ECN members have access. The result is that the European Commission and the EU NCAs are notified automatically. Being notified of proceedings enables interested NCAs to take further action pursuant to Directive 1/2003/EC as well as national regulations.

Regulation 139/2004, by contrast, obliges the European Commission to notify NCAs of all market merger cases pending before an EU body. Article 19(1) states, *inter alia:*

> The Commission shall transmit to the competent authorities of the Member States copies of notifications within three working days and, as soon as possible, copies of the most important documents lodged with or issued by the Commission pursuant to this Regulation.

The EU Merger Regulation (EUMR) therefore provides no basis for member state NCAs to inform each other about notified mergers. ECA and MWG recommendations remedy this omission. An ECA document entitled *The Exchange Between Members on Multijurisdictional Mergers: Procedures Guide*[6] provides that where an NCA is notified of a proposed merger which may be a candidate for referral to the European Commission, the NCA should determine whether the matter is subject to notification in another ECA member state, and if so, whether such notification has been made. If the notified merger is subject to notification in another ECA member state, the NCA should send the relevant information to interested countries (so-called 'ECA notice'), which can then decide whether to jointly refer the case to the European Commission. Sending an ECA notice and establishing contacts between NCAs should not depend on whether all interested countries have in fact been officially notified. The ECA notice to be forwarded (as per the template in Appendix A of the ECA Procedures Guide) includes:

- the names of the parties to the merger;
- the capital groups, markets and/or economic sectors in which they operate;
- the date on which the proceedings were initiated and their expected termination date;
- the contact details of the case handler; and

6 ECA, The Exchange of Information Between Members on Multijurisdictional Mergers Procedures Guide, https://ec.europa.eu/competition/ecn/eca_information_exchange_procedures_en.pdf (accessed 31 July 2021).

- the countries likely to be affected.

In principle, the NCAs of the ECA member states can contact each other directly and exchange opinions on a case being investigated on the basis of this information. Moreover, pursuant to Part 4.2 of the MWG's *Best Practices on Cooperation Between EU National Competition Authorities on Merger Review*,[7] NCAs should additionally notify each other of the commencement of a Phase II merger investigation and the issue of a final decision – especially a conditional decision – within the ECA framework.

7.1.3 Exchanging unclassified information concerning proceedings and other information that is not subject to legal protection

Exchanging legally protected information requires a clear legal basis and the general jurisdictional norm does not suffice for this purpose. However, when cooperating within a TCN, information that is not legally protected and that may be beneficial for other network members can be freely exchanged, with the general jurisdictional norm deemed an adequate legal basis. This might include information about proceedings, non-confidential market information or information about the administrative practice of a particular NCA; and it may be of use to other NCAs in conducting proceedings. It is also worth noting that even where particular information cannot be forwarded as part of international cooperation, the mere knowledge that this legally protected information exists can be useful, as the foreign NCA can use it directly to summons a party or some other undertaking obliged to cooperate to produce it.

However, there exists a grey area where the classification of information may be troublesome. This concerns internal agency information. This may be information relating to proceedings being conducted or contemplated by an NCA, but which are not necessarily known to the public; or staff assessments of substantive issues in a given case, from determining the relevant product and the geographic market to the applicable theory of harm.[8] Such information is not usually protected and may be freely exchanged. This is justified by the fact that such exchanges do not involve confidential information as regards a third party and are conducted on an informal basis.[9] There is no universal principle on how to treat internal NCA information; national law (or transnational law, where applicable) will be decisive in this regard.

7 EU Merger Working Group: Best Practices on Cooperation between EU National Competition Authorities in Merger Review, https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Others/BestPractices-EUmergerWorkingGroup.html;jsessionid=6B25D39353BFACF17A3A9697503D4850.1_cid362?nn=3590380 (accessed 31 July 2021).

8 D. Viros, 'Cooperation in the Field of Competition Enforcement: Takeaways for National Competition Authorities from the Prevailing International Legal Landscape', in M. Błachucki (ed), *International Cooperation*, pp. 218–219, DOI: 10.5281/zenodo.4199829.

9 Ibid.

The issue of information exchange is covered in an ECA document entitled *The Exchange Between Members on Multijurisdictional Mergers: Procedures Guide*. This document covers the exchange of information between NCAs when reviewing the same multi-jurisdictional merger simultaneously and in parallel, in order to facilitate cooperation in such circumstances. The document highlights that, while the exchange of general information about a case is always possible and desirable, whether legally protected information can be exchanged this way will depend on national legal regulations. The exchange of non-confidential information should not be confined to merger proceedings, but should be allowed in all competition proceedings. The 2014 OECD Recommendation draws attention to this. Part VII.4–5 explicitly encourages NCAs to exchange information in the public domain, as long as such exchanges are subject to no legal constraints.

Information that is not legally protected and can thus be exchanged between NCAs includes information concerning the course of proceedings, intended administrative actions and preliminary conclusions resulting from evidence proceedings. It is difficult to place limits on the information about proceedings that NCAs can disclose to one another. While the rules on legally protected information (especially information containing commercial secrets received from the parties and others involved in the proceedings, as well as from third parties) are clear, information on administrative actions and assessments, or an NCA's plans and objectives, is not usually directly regulated at either the national or international level. This sort of exchange is permissible provided that an NCA is exercising its administrative jurisdiction, in which case it is legitimate and legally admissible to inform a cooperating NCA of its actions or the conclusions it has drawn from proceedings. However, this cannot result in the disclosure of commercial secrets or other legally protected confidential information. The cooperating NCAs must also establish the extent to which the parties to the proceedings can access such information. This may be especially problematic for some NCAs – including, for example, the Polish OCCP, as Polish law provides that a party to proceedings can only access certain information about the OCCP's findings; and that information about the OCCP's planned actions is restricted and cannot be accessed without its consent. This prohibits a party appearing before a foreign NCA from discovering, for example, the findings that the OCCP has obtained from another NCA which is simultaneously conducting proceedings on the same issue. It is therefore important that these rules between NCAs be established before information is exchanged and applied in line with the principle of mutual trust. As this issue can raise significant concerns, it is revisited later in this chapter.

7.1.4 Reporting on administrative actions in another jurisdiction

The transnational nature of many competition cases can require that procedural action be taken in other countries. This most often involves undertakings in other countries being called on to produce information by completing surveys and questionnaires. In principle, the cooperation of foreign undertakings is purely voluntary, as NCAs have no enforcement powers outside their jurisdictions. It

would also be highly questionable, from the perspective of international law, if they tried to extend their enforcement powers outside their attributed jurisdictions. The 2014 OECD Recommendation, which restated a recommendation from 1995, advises NCAs to inform each other about actions such as surveying foreign undertakings. However, the degree to which this is observed differs – for example, the Polish OCCP has received pertinent information about Polish undertakings being surveyed from the German and Swedish agencies. For its part, the (former) UK Office Fair Trading[10] ceased forwarding this sort of information to the OCCP.[11] Moreover, the Polish OCCP frequently fails to comply with its obligations regarding anti-competitive practices and merger control by not informing its foreign counterparts of having surveyed undertakings. This is hardly worthy of approbation. It is worth mentioning in this regard that fairly detailed principles apply to the European Commission. The Commission can solicit information from undertakings by way of a simple request, in which case a response is voluntary; or by way of decision, in which case a response is obligatory. Crucially, the Commission will inform the affected NCAs of all cases involving the restriction of competition, regardless of the means used to solicit information (Directive 1/2003/EC, Article 18(5)). In merger cases, the Commission is required to inform the NCAs that it has sent out surveys or questionnaires only where the information is solicited by way of decision (Directive 139/2004/EC, Article 11(5)). It is difficult to fathom the rationale behind this diversification.

Mutual reporting on evidentiary activities being undertaken in another jurisdiction is not merely a mark of courtesy, but a formal obligation. Moreover, in practice, Polish undertakings which are solicited for information by foreign NCAs or the European Commission often appeal to the OCCP to clarify the nature of the request and their obligations in connection therewith. If a foreign NCA ceases to inform it of such activities, the OCCP may find itself blindsided by unexpected questions from undertakings; in which case it will not always be able to furnish complete information. It is hard to imagine the OCCP being overly keen to support and encourage Polish undertakings in assisting foreign NCAs in this situation.

7.1.5 Informal assistance among network members

Legal assistance occurs on both national and international grounds. Legal assistance is sought where a NCA conducting competition proceedings requests another NCA or a court to undertake a particular official action in its name and on its behalf. Such assistance has several key features. First, this assistance is of an informal nature – that is, it is not connected with the performance of any official administrative actions and the NCA providing it acts exclusively on its own behalf and within the scope of its general competence. Second, this assistance is not limited to evidence actions, but may extend to the entire sphere of the jurisdiction of the NCA within which it is

10 The predecessor of the Competition and Markets Authority.

11 See further M. Błachucki, *System postępowania antymonopolowego w sprawach kontroli koncentracji przedsiębiorców*, Warsaw, OCCP, 2012, pp. 115–116.

competent to provide assistance. Third, this assistance is usually provided by NCAs. It is difficult to envisage a common or administrative court providing informal assistance, as it would have to operate in an extra-procedural manner. These features make it possible to distinguish between informal official assistance and formal legal aid in both the domestic and transnational spheres.

The practice of the Polish OCCP confirms that informal assistance is indeed provided to foreign NCAs. It is difficult to determine the frequency with which this happens; but in merger cases, it certainly appears to be a common occurrence. Such assistance often relates to the failure of an undertaking to respond to a request for information from a foreign NCA. Apart from exceptional situations regulated by EU law, domestic undertakings are not generally obliged to respond to requests for evidence from foreign NCAs. Also, the possibility for an NCA to effectively request explanations from foreign undertakings is theoretically very limited, and in practice non-existent. At the same time, there are still no general regulations in national or transnational law establishing general principles for the provision of legal or other assistance to a foreign public administration authority.[12] Therefore, in the absence of binding provisions establishing formal international legal assistance, NCAs may provide each other with informal official assistance. Such assistance will not affect the rights and obligations of third parties and may prove effective if the NCA concerned has the competence and the gift of persuasion. Indeed, such assistance can only be based on non-statutory actions of an informative and persuasive nature (as regards undertakings).

The need for mutual official assistance within the framework of international cooperation of NCAs is addressed in the guidelines of TCNs. For example, Paragraph VIII of the 2014 OECD Recommendation emphasises the legitimacy of providing such assistance. The Recommendation lists examples of forms of assistance, but with the caveat that the provision of assistance in a particular case will depend on national legislation. At the same time, before requesting official assistance, an NCA should verify whether the provision of such assistance is possible and, if so, what form it can take. The Recommendation refers to the voluntary nature of legal assistance; but in case of a refusal to provide it, the recipient NCA should provide the requesting NCA with reasons for this decision. It should come as no surprise that the OECD has reported that 'less than half of the responding Adherents say that they have used Section VIII, and this number includes Adherents who are part of regional networks, where this type of assistance is more common'.[13] Such assistance is common to administrative networks which are usually of a continental (ECN) or regional (Nordic Cooperation) nature.

12 Certain possibilities in this respect could be created by the Conventions of the Council of Europe. For more on this topic, see M. Błachucki, 'Postępowanie antymonopolowe w sprawach koncentracji w świetle aktów prawa wtórnego Rady Europy', in R. Stankiewicz (ed), *Kierunki rozwoju prawa administracyjnego*, Warsaw, Publishing House of UW, 2011, pp. 17 ff.

13 OECD, International Co-operation on Competition Investigations and Proceedings: Progress in Implementing the 2014 OECD Recommendation, 2022, https://www.oecd.org/daf/competition/international-cooperation-on-competitioninvestigations-a

In practice, informal official assistance may concern the ascertainment of the factual or legal situation within a given jurisdiction, as long as this involves no formal administrative act.[14] As an example of informal assistance, the Polish NCA has provided information from the National Court Register to the German and Ukrainian NCAs. Most often, however, informal legal assistance concerns the sharing of experiences of other countries in applying regulations or resolving a given category of cases, or the sharing of case law concerning a given economic sector.[15] Similarly, such assistance often arises when information is requested from Polish undertakings by a foreign NCA. In several cases where a foreign NCA (eg, from the United Kingdom or Ukraine) sent a questionnaire, the Polish NCA undertook information activities of a non-binding, persuasive nature to encourage Polish undertakings to assist the foreign NCA. The Polish NCA sent informative letters to undertakings telling them that a foreign NCA had asked for assistance and setting out a brief explanation of the essence of merger control proceedings and the importance of market research to them. This was followed by an explanation that such proceedings are also conducted in the interests of the recipient undertakings, which should be interested in ensuring that anti-competitive mergers do not take place on the markets in which they are active. Interestingly, there is no publicly available information as to whether the OCCP has applied to foreign NCAs for informal legal assistance itself.

Informal cooperation and legal aid are promoted by TCNs. According to the United Nations Conference on Trade and Development, in the absence of formal cooperation instruments, informal legal aid can prove to be an effective mechanism for cooperation and mutual assistance. Moreover, even where formal cooperation mechanisms exist, informal assistance is an important complement to them.[16] It seems that under national law, informal official assistance should be approached with a degree of caution. However, provided that the NCA is aware of the legal limits to informal assistance, the involvement of NCAs in such assistance should be postulated. Informal assistance affords greater legal certainty to undertakings, which receive an official confirmation and explanation of administrative actions from a foreign NCA (with their rights fully preserved). Moreover, it may help to build trust between NCAs; and it will serve as a basis for reciprocity should the NCA that receives the request subsequently find itself in need of such assistance.

nd-proceedings-progress-in-implementing-the-2014 recommendation.htm (accessed 31 June 2022), p. 63.

14 This may involve, for example, establishing the registered office or representation of the undertaking or the history of its capital or organisational transformations. It may also include an assessment of the legality of certain acts of the undertaking under Polish law, with the proviso that such an assessment is informal and not binding, as it is made outside the procedural framework.

15 M. Widegren, 'Consultation among Members within the Network', in C.-D. Ehlermann, I. Atanasiu (eds), *European Competition Law Annual 2002*, p. 424

16 UNCTAD, Informal Cooperation among Competition Agencies in Specific Cases, 28 April 2014, p. 2, http://unctad.org/meetings/en/SessionalDocuments/ciclpd29_en.pdf (accessed 31 July 2021).

7.2 Administrative acts under international cooperation affecting the rights and obligations of parties and participants in competition proceedings

Another group of administrative actions comprises those that affect the rights and obligations of the addressees of legal actions of the NCA and which have their basis in universally binding provisions of law. First, the legal basis may be found in domestic law. While this may present ample opportunities for NCAs to cooperate within TCNs, national law very seldom grants NCAs the competence to take actions in the transnational sphere that could affect the rights and obligations of the participants in the proceedings. Second, the legal basis may be contained in international agreements. However, in the vast majority of cases, these concern bilateral relations rather than networks. There are some multilateral agreements that provide a basis for such cooperation – one example being the Nordic Cooperation.[17] Third, regional or continental integration organisations can create common rules as a basis for such cooperation. The most important and well-developed system here is European law. The set of norms of the EU *acquis communitaire* creates a binding legal basis for such actions by NCAs within the framework of international network cooperation.

7.2.1 Exchange of protected information and evidence

In addition to non-confidential information and information concerning the proceedings and findings of NCAs, the exchange of legally protected information among NCAs is also possible in certain situations. Such exchange is advocated and described in the recommendations of the OECD[18], the ICN[19] and the ECA;[20] as well as by hard and soft EU law[21] and the ECN.[22] Due to the nature of the information to be exchanged, all networks and their documents stipulate that such

17 M. Martyniszyn, 'Inter-Agency Evidence Sharing', pp. 23–24.

18 See OECD Recommendation 2014 and Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations, October 2005, https://www.oecd.org/daf/competition/cartels/35590548.pdf (accessed 31 July 2021).

19 See EC, Co-operation between Competition Agencies in Cartel Investigations, Moscow, May 2007, https://ec.europa.eu/competition/international/multilateral/cartels_cooperation.pdf (accessed 31 July 2021); ICN, Model Confidentiality Waiver for Mergers, https://www.internationalcompetitionnetwork.org/portfolio/model-confidentiality-waiver-for-mergers/ (accessed 31 July 2021).

20 See The Exchange of Information between Members on Notifications, Proceedings and Decision in the field of Air Transport – Procedures Guide; The Exchange of Information between Members on Multijurisdictional Mergers – Procedures Guide, http://www.concorrencia.pt/vEN/Sistemas_da_Concorrencia/European_Competition_System/European_Competition_Authorities_ECA/Pages/ECA-Working-Groups.aspx (accessed 31 July 2021).

21 In particular, Article 12 of Regulation 1/2003 and Articles 11 and 19 of Regulation 139/2004.

22 Commission Notice on Cooperation within the Network of Competition Authorities, OJ C 101, [2004], p. 43–53.

exchange is possible as long as it is permitted by explicit provisions of mandatory law (national or transnational). The exchange of protected information and evidence can take place on the basis of:

- cooperation based on waivers;
- cooperation based on provisions of national law;
- cooperation based on non-competition-specific agreements and instruments;
- cooperation based on competition-specific agreements; and
- regional cooperation instruments.[23]

The analysis of soft law acts prepared within the framework of TCNs reveals that the simplest legal solution to enable the exchange of information and evidence is the confidentiality exemption. This does not require a specific basis in national or transnational law, but relies entirely on the cooperation and willingness of undertakings or other producers of information. A model for this exemption has been prepared by the ICN.[24] This document is also referenced in the best practices of the EU MWG, which encourage its use in international cooperation in merger control cases. However, the use of confidentiality exemptions should be based on transparent principles: the undertaking should consent voluntarily and expressly (any implied means of consent should be excluded in advance) to the provision of such information; and the scope of information provided should be strictly related to the nature of the case and the purpose for which the information is provided. Not all national laws allow for the use of the waiver mechanism. For example, the use of waivers may be questionable under Polish law.[25] Nevertheless, in some situations this may be the only instrument available to the NCA for the exchange of information and evidence.[26]

In each national legal order, the issue of exchange of protected information with foreign authorities is regulated autonomously. For example, under Polish law, there are no general grounds for the exchange of protected information. The Code of Administrative Procedure on European Administrative Cooperation unambiguously allows for the exchange of protected information if this is provided for in European law. Similarly, the Polish Competition Act limits the international exchange of protected information to cases where EU law is applied, mirroring the European regulations in this respect. OECD research reveals that few jurisdictions have national laws authorising the exchange of legally protected information.[27] This shows that

23 UNCTAD, Modalities and Procedures for International Cooperation in Competition Cases Involving More than One Country, 26 April 2013, p. 4, http://unctad.org/meetings/en/SessionalDocuments/ciclpd21_en.pdf (accessed 31 July 2021).
24 Model Confidentiality Waiver for Mergers.
25 M. Błachucki, *System postępowania*, p. 244.
26 Am undertaking can always provide information on its own and without the intermediation of the NCA to other NCAs. The disadvantage of this solution, however, is that NCAs are still obliged to protect the information, even if they know that their foreign partners have access to it.
27 OECD, National and International Provisions for the Exchange of Confidential Information between Competition Agencies without Waivers, 2 October 2014, p. 2, https://

national legislatures are reluctant to equip NCAs with such far-reaching powers without a guarantee of reciprocity on the other side.

Some international agreements provide for the exchange of protected information as part of international cooperation in competition matters. Such agreements have been concluded by other countries – in particular, the Nordic countries and Australia-New Zealand.[28] The European Union (with the United States and Switzerland) and the United States and Australia are parties to many such agreements. Although international agreements allow for the exchange of protected information, they also specify rather extensive and formalistic procedures for the transfer of such information. As a result, NCAs do not use these instruments very often.[29] This also explains the preference for obtaining exemptions from confidentiality, which appears to be a quicker, less formal procedure, in which the parties have full awareness and control over which information is transmitted and to whom.

Given the above, from the point of view of most European NCAs, EU law is fundamental to the exchange of protected information. Under Regulation 1/2003, NCAs can exchange all information and evidence with the European Commission. Any evidence gathered – even evidence protected on the grounds of commercial secrecy or individual privacy– can be the subject of this exchange. The legal basis is Article 12 of Regulation 1/2003, supplemented by the Commission Notice on technical aspects of communicating protected information. In addition, the Commission must automatically transmit to NCAs the most important documents collected in a case involving anti-competitive practices (Article 11(3) of Regulation 1/2003). Interestingly, before the creation of the ECN, the Commission had a broader obligation to transmit documents to NCAs. Thus, since the creation of the ECN, the Commission's information obligations have been reduced.[30] Article 12 of Regulation 1/2003 imposes restrictions on the use of the information transmitted. NCAs must agree on what information will be transmitted and whether it will be equally protected in both jurisdictions.[31] This cooperation is essential to adequately protect the rights of the parties to which the information relates. Importantly, ECN members can only exchange protected information if EU rules apply. If only national rules apply, the possibility to exchange information is limited to non-confidential information.

www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2013)4&doclanguage=en (accessed 31 July 2021).

28 Detailed analysis of the Australia-New Zealand agreement is presented in M. Martyniszyn, 'Inter-agency evidence', pp. 24 ff.

29 OECD, National and International Provisions.

30 M. van der Woude, 'Exchange of Information within the European Competition Network. Scope and Limits', in C.-D. Ehlermann, I. Atanasiu (eds), *European Competition Law Annual 2002*, p. 378.

31 A.W. Kist, 'Exchange of Information. Scope and Limits Seen from the Perspective of the National Competition Authorities', in C.-D. Ehlermann, I. Atanasiu (eds), *European Competition Law Annual 2002*, pp. 363 ff.

The situation is different when it comes to the application of European rules on the control of concentrations. Regulation 139/2004 contains no analogous provisions allowing for the exchange of information: Article 11 states that the Commission may request any information from NCAs; and Article 19 indicates that the Commission is obliged to transmit certain documents concerning notified mergers to all NCAs. As a result, there is no real information and evidence exchange mechanism in relation to merger control; but the Commission is obliged to transmit certain evidence to NCAs and, at the same time, can request all information and evidence from them. It follows that in merger control cases, NCAs cannot exchange protected information, even when applying European (not to mention national) rules. As a further consequence of these principles, where the Commission refers a case to an NCA pursuant to Regulation 139/2004, it may not pass on to the NCA protected information obtained in the course of the proceedings from the parties or from third parties (other than information previously submitted pursuant to Article 19). In order to transmit protected information, the Commission must obtain a waiver from each originator of the information.

The diversity of the principles on the transmission and exchange of protected information in European law is explained by the different way in which the rules are applied in the fields of anti-competitive practices and merger control. While the former field involves a decentralised system for implementing European law in parallel with national law, the latter involves the separate application of national and European rules. As a consequence, when applying EU antitrust rules, NCAs are empowered to exchange classified information among themselves and with the Commission; whereas under the merger rules, the Commission may demand NCAs to transfer classified information, but there is no reciprocal rule obliging it to transmit any confidential information to NCAs when national merger proceedings are ongoing. This also shows that the EU rules on merger control are less developed than those on anti-competitive practices.[32] These conclusions are confirmed by the observation that the imperative of maintaining the benefits of the centralised enforcement of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), while devolving its implementation in part to NCAs, was a key factor in establishing a conducive environment for cooperation among NCAs under Regulation 1/2003. Conversely, there was no such historic imperative in the field of merger control – even if maintaining consistency between the approaches of NCAs is naturally seen as desirable.[33]

Information exchanged within the ECN enjoys specific protection and cannot be made accessible under the rules that guarantee access to public information. A recent judgment of the General Court makes clear that such documents enjoy a presumption of protection for reasons of commercial secrecy and the interests of

32 M. Błachucki, S. Jóźwiak, 'Exchange of Information and Evidence between Competition Authorities and Entrepreneurs' Rights', *YARS*, vol. 5, iss. 6, 2012, pp. 165–166.

33 D. Viros, *Cooperation in the Field of Competition*, p. 228.

the proceedings, and cannot be made accessible to third parties without verification of their content by the relevant NCA.[34] This ruling is important as it guarantees the confidentiality of the dialogue between ECN members and reinforces mutual trust in the protection of information and evidence transmitted within the network.[35]

To conclude this thread of the discussion, it is worth mentioning that the exchange of protected information in cases involving anti-competitive practices requires broader regulation, due to additional legal issues related to it. While in the case of merger control the information exchanged is used to assess the merger, the process of collecting it is standard and, in principle, there are no sanctions for the parties involved; there are more complicated issues in cartel cases. First, depending on the legal system, competition liability can be criminal or administrative. Second, this liability may apply to legal persons and/or natural persons. Third, protected information may include information obtained through the leniency procedure, which is characterised by an additional scope of information protection. As a result, these circumstances must be taken into account both at the level of establishing the legal possibilities for international exchange of protected information in cartel cases and in the direct application of these provisions by NCAs.

7.2.2 Mutual assistance

Mutual legal assistance in competition matters, being formalised, takes place exclusively on the basis of universally binding provisions of international agreements or European law. It is difficult to assume that such a basis is exclusively national, as it is inconceivable that national rules could impose obligations on NCAs of another country. As far as European law is concerned, the norms for formal mutual assistance can be found in the ECN+ Directive and Regulations 1/2003 and 139/2004.

Pursuant to Article 22 of Regulation 1/2003, at the request of the European Commission or another European NCA applying the provisions of Regulation 1/2003, an NCA may provide them with legal assistance and, in particular, carry out any inspections or other measures of inquiry provided for under national law on behalf and for the account of the NCA of another member state in order to establish whether there has been an infringement of Article 101 or 102 TFEU. In practice, the European Commission usually summons national undertakings to provide explanations on its own and also conducts its own inspections (assisted only by European NCA officials). In contrast, on several occasions, the Polish NCA, at the request of foreign NCAs, has initiated investigations to collect information and explanations. According to publicly available information, the Polish NCA has not yet conducted inspections of Polish entrepreneurs at the request of other ECN members.

34 Case T-419/13, *Union de Almacenistas de Hierros de España v European Commission* of 12 May 2015, ECLI:EU:T:2015:268.

35 V. Pereira, J. Capiau, A. Sinclair, 'Union de Almacenistas de Hierros de Espana v Commission. Strengthening a Climate of Trust within the European Competition Network', *JECLP*, vol. 7, iss. 2, 2016, p. 119.

These provisions are developed in Chapter VII (Articles 24–28) of the new ECN+ Directive. Article 24 harmonises national rules on inspections with searches in connection with the conduct (or intention to initiate) of antitrust proceedings by an NCA under the Treaty rules. It requires all countries to ensure that the premises of an undertaking or association of undertakings may be searched, as well as other premises or means of transport, including the homes of directors, managers or other employees of the undertaking or association of undertakings. In addition, the participation of officials of foreign NCAs is to be allowed in all these actions. Thanks to this provision, a common European standard for searches will be achieved, which may translate into an increased role for this instrument of network cooperation.

The ECN+ Directive introduced in Article 25 a new instrument of international cooperation of ECN members by regulating the obligation to serve on domestic entrepreneurs at the request of foreign authorities certain documents related to the conduct of antitrust proceedings by a foreign NCA under the provisions of the TFEU. The obligation of service concerns the following documents:

- any preliminary objections to the alleged infringement of Article 101 or 102 TFEU and any decisions applying those articles;
- any other procedural act adopted in the context of enforcement proceedings which should be notified in accordance with national law; and
- any other relevant documents related to the application of Article 101 or 102 TFEU, including documents which relate to the enforcement of decisions imposing fines or periodic penalty payments.

The Directive does not introduce separate rules, depending on the types of documents served. In the past, it was indicated that the service of foreign documents in antitrust proceedings varies depending on the nature of the document served.[36] Such service shall be effected upon request by a member of the ECN, and shall be effected by an NCA upon an undertaking established or carrying on business and having an address for service within its jurisdiction. The serving NCA is responsible for the correctness and legality of the service. Indeed, the Directive clearly indicates that 'Member States shall ensure that the requests as referred to in Articles 25 and 26 are executed by the requested authority in accordance with the national law of the Member State of the requested authority'. At the same time, it must be recognised that the NCA has a duty to examine the content of the letters to be served in order to verify that they fall into one of the categories indicated above and are written in the agreed language; although at the same time, it may not interfere with the content of the documents to be served.

The service of foreign documents does not affect the jurisdiction of NCAs and is a purely technical procedural act. Therefore, any dispute concerning the legality of the remedy of which the document served is the physical medium shall be governed by the law of the requesting member state and shall be subject to its

36 C. Canenbley, *Enforcing Antitrust Against Foreign Enterprises*, Dordrecht, Springer, 1981, pp. 41 ff.

national law (Article 28(1) of the ECN+ Directive). Even more complicated to apply is the provision in the ECN+ Directive which stipulates that disputes concerning the validity of a notification made by the requested authority fall within the competence of the competent authorities of the requested member state and are subject to the legislation in force in that state. As noted earlier, under national law, notification is essentially a technical act and there is no right of appeal against it. It is therefore difficult to determine under what procedure and before which national authority or court a dispute concerning the validity of notification should be brought. It may be assumed that in most cases, this will not constitute a significant procedural issue; but the situation may become complicated in the case of so-called 'substitute service' or the use of fictitious service.

The most far-reaching instrument of international networking is introduced by Article 26 of the ECN+ Directive. This provides for the enforceability in the domestic legal order of foreign decisions adopted in accordance with Articles 13 and 16 of the Directive. Importantly, this provision uses the concept of a decision in a broad sense, making it applicable to both administrative decisions and court judgments (in some EU member states, the imposition of fines is reserved for ordinary courts). An ECN member can ask another network member to enforce a decision if:

> after having made reasonable efforts in its own territory, the applicant authority has ascertained that the undertaking or association of undertakings against which the fine or periodic penalty payment is enforceable does not have sufficient assets in the Member State of the applicant authority to enable recovery of such fine or periodic penalty.

A good example of this situation is where the Lithuanian NCA imposed a fine of over €35 million on Gazprom and, the day after the fine was imposed, Gazprom sold all its remaining assets in Lithuania, making execution of the fine almost impossible.[37] A formal condition for requesting enforcement of a decision is that the decision authorising enforcement in the requesting member state must be final and not subject to ordinary legal remedies. Also importantly, the limitation period for enforcement of the decision is governed by the rules in force in the requesting member state. At the same time, however, the ECN member must ensure that the decision is enforced in accordance with the national laws, regulations and administrative practices in force in Poland. This provision contains one safeguard for refusing to enforce a foreign decision. The ECN member will not be obliged to enforce it if:

- the request does not comply with the formal requirements of Article 27; or
- the requested authority can demonstrate reasonable grounds showing how execution of the request would be manifestly contrary to public policy in the member state in which enforcement is sought.[38]

37 M. Martyniszyn, 'Competitive Harm Crossing Borders: Regulatory Gaps and a Way Forward', *JCLE*, vol. 17, iss. 3, 2021, p. 693.

38 Article 27(6) of the ECN+ Directive.

The grounds for refusal are pragmatic and rational. Execution of a foreign decision is always based on the transfer of jurisdictional sovereignty. Therefore, any measure that is manifestly contrary to public policy in the member state may not be executable in that member state. The ECN+ Directive requires that the contradiction be 'manifest', which should be seen as a mitigating factor for the discretion of a network member to exercise the right to refusal.

The ECN+ Directive specifies in Article 26(2) that 'the settlement of disputes concerning enforcement measures taken in the requested Member State falls within the competence of the competent authorities of the requested Member State and is subject to the laws in force in that State'. This means that the correctness of any[39] enforcement procedure is assessed in the light of national rules (which may be either administrative or civil enforcement rules, depending on the nature of the competition ruling being enforced). National laws will also determine the legal position of the obliged entities during this procedure.

Regulation 139/2004 adopts a narrower legal aid framework, which results from the different system of merger control in the European Union based on the division of competences and the separate and exclusive application of EU and national law. As a result, the legal aid provided for in this regulation has a rather one-sided dimension. Pursuant to Article 12 of Regulation 139/2004, at the request of the European Commission, the NCA may control an undertaking on the spot. This inspection takes place in accordance with national law and is carried out by officials of the NCA, who may be assisted by Commission officials. The Commission very rarely conducts inspections of undertakings in merger control cases; this has only happened a few times in history.

7.2.3 Refraining from or suspending or discontinuing proceedings

An important aspect of international cooperation of NCAs is the question of the impact of the pendency or resolution of a case by a foreign NCA on the initiation or pendency of a case before another NCA. NCAs may take into account administrative proceedings conducted in other countries only insofar as international treaties or European law so provide. However, international treaties on cooperation between national public administrations are generally bilateral and deal with specific issues.[40] Outside the European administrative space, however, the impact of proceedings in other jurisdictions on the course of domestic competition proceedings is largely unregulated. This is important because, on the one hand, it concerns parallel proceedings conducted by two NCAs on the same case; and on the other hand, it highlights the issue of legal certainty and equal treatment of identical conduct of entrepreneurs. At the same time, cases concerning merger

39 Of course, enforcement proceedings will only be initiated in the absence of voluntary enforcement of the foreign competition ruling.

40 J. Basedow, 'Who Will Protect Competition in Europe? From Central Enforcement to Authority Networks and Private Litigation', *European Business Organization Law Review*, vol. 2, iss. 3–4, 2001, p. 449.

control and anti-competitive practices should be treated separately. Their legal regulation is also separate and different legal issues arise when considering them.

Multi-jurisdictional mergers are a consequence of a globalising economy and the prevalence of merger control laws. This results in the same mergers being subject to parallel examination by many NCAs around the world. This phenomenon is to some extent limited by the European system of merger control, within which the European Commission is competent to deal with mergers with a Community dimension from the outset. In addition, there are legal possibilities for national NCAs to refer cases with a national dimension to the Commission, which eliminates the need for parallel assessment of a merger by several European NCAs.[41] Where a case is taken over by the European Commission, any EU NCA proceedings on the merger which had been initiated previously must be discontinued.[42] However, the simultaneous examination of a merger by several NCAs should be regarded as unavoidable, for the reasons discussed earlier in this paragraph. It does not, however, affect the course of the proceedings or the pendency of the case before these NCAs. There are no universal or regional rules which apply simultaneously to the notification and assessment of multi-jurisdictional mergers.[43] This results in each NCA applying its national rules and assessing mergers from the point of view of their impact on a market covering part or all of a given country. In this situation, the examination of a case by another foreign NCA does not constitute such a legally significant issue that it should be a reason for suspending or discontinuing the proceedings, let alone an obstacle to the initiation of proceedings. Although it does not affect the course of proceedings, the parallel conduct of merger proceedings may encourage cooperation among NCAs and, in particular, the exchange of information or agreement on the conditions imposed. A number of TCNs stress the relevance of such cooperation and coordination.

Transnational cartels present a more complex jurisdictional issue, especially in the European context. Regulation 1/2003 introduces a system for the decentralised application of European rules against anti-competitive behaviour, which results in European NCAs applying European rules in parallel (Articles 101 and 102 TFEU) alongside national rules. This means that a given entrepreneurial behaviour is assessed under the same rules, although by different NCAs. This in turn makes it necessary to introduce rules against the double criminalisation of the same behaviour by two NCAs under the same rules. For this reason, Article 13 of

41 Similarly, the European Commission can also refer cases to NCAs, although this happens disproportionately less often.

42 Sometimes, where the European Commission takes over a case, there will be a prior *lis pendens* before the EU NCA and the proceedings will have to be discontinued. If the undertakings request the Commission to take over the case on the basis of Article 4(4) of Regulation 139/2004, prior notification of the concentration to the NCA is not necessary.

43 At the same time, it is impossible not to notice the progressive convergence of these rules (especially those of substantive law) primarily within the European Union, but also globally.

Regulation 1/2003 provides that the pendency of a case before one NCA conducting proceedings under the provisions of the Treaty is grounds for another ECN member to suspend proceedings or to refuse to initiate them. The Polish Competition Act recognises this problem and, in Articles 75 and 87, sets out obligatory and optional grounds for the discontinuance and suspension of proceedings before the President of the OCCP where a case is taken over by the European Commission or conducted by another EU NCA; as well as the possibility or obligation not to initiate proceedings. Therefore, these norms do not regulate the concurrence of liability for the violation of Polish and foreign regulations, but are of a jurisdictional nature.[44] The provisions of the Competition Act[45] are of an executive nature in relation to the provisions of Article 13 of Regulation 1/2003. The General Court recently held that Article 13(1) of Regulation 1/2003 should be interpreted broadly, and its application does not require a specific justification by the NCA. However, Article 13(1) requires that it be shown that the case is formally pending, and therefore that the mere informal handling of the complaint will not suffice to fulfil the disposition of that provision.[46] Similarly, in a further judgment, the General Court took an equally flexible view of Article 13(2) of Regulation 1/2003, which allows an NCA to reject a complaint and refuse to initiate proceedings if a case has already been dealt with by another ECN member.[47] These judgments reinforce the interdependence of the members of the network and provide for the possibility to rely on proceedings in other ECN jurisdictions.[48]

The provisions of Regulation 1/2003 are applicable where an NCA is applying the TFEU competition rules. Otherwise, the legal situation concerning proceedings relating to the anti-competitive behaviour of undertakings is similar to the situation in the field of merger control. However, even in a case of parallel examination of anti-competitive behaviour by undertakings based solely on national rules, cooperation in the conduct of proceedings or coordination of decisions may be justified. This issue is of particular importance from the point of view of undertakings which, in conducting their activities on a transnational scale, may by their conduct simultaneously violate many national provisions in force in various jurisdictions. In such a situation, cooperation on the basis of rules defined by TCNs becomes crucial. As there are few formal law rules outside the realm of European law which allow proceedings to be suspended or discontinued on the grounds that a case is pending in another jurisdiction, soft law rules which define the principles of cooperation of NCAs and make it possible to shorten national proceedings by coordinating administrative actions at a transnational level are all the more important.

44 A. Błachnio-Parzych, *Zbieg odpowiedzialności karnej i administracyjno-karnej jako zbieg reżimów odpowiedzialności represyjnej*, Warsaw, WK, 2016, p. 254.
45 Polish Act on Competition and Consumer Protection of 16 February 2007, JoL 2019, item 369 ('Competition Act').
46 Case T-201/11, *Si.mobil v Commission*.
47 Case T-355/13, *easyJet Airline v Commission*.
48 D. Viros, 'Si.mobil Telekomunikacijske. The Rejection of Complaints as a Tool to Manage Decentralized Enforcement Within the ECN', *JECLP*, 2015, vol. 6, iss. 6, pp. 416–417.

7.2.4 Coordination and reconciliation of administrative actions by NCAs

International cooperation between NCAs can relate to ongoing or planned competition proceedings. Such cooperation will most often concern cases with a transnational dimension; although it may also be appropriate in relation to national cases (as long as the potential effects can extend beyond national borders). This gives NCAs a basis for coordinating administrative action in planned or ongoing proceedings. Coordination and concertation differ, in that the former is broad in nature and refers to an agreement to undertake specific administrative acts at the same time or in relation to specific entities. Reconciliation involves agreement on the content of administrative action and, for instance, its harmonisation. Coordination may also lead to the agreement of administrative acts, but this will not always be the case in practice.

Coordination of administrative acts of NCAs may also take the form of enhanced cooperation through the adoption of the formal concept of a lead jurisdiction.[49] This formalised coordination is based on binding legal instruments, so that acts undertaken by the coordinating NCA are also binding on the coordinated NCAs. However, it requires a separate legal basis as a formalised form of far-reaching international cooperation. This is considered in the following chapter.

The 2014 OECD Recommendation indicates in Paragraph V that when NCAs from two or more OECD member countries are investigating the same or a related anti-competitive practice or business merger, they should coordinate their investigations if they jointly consider that it is in their interests to do so. Although such cooperation is purely voluntary, the Recommendation introduces certain principles for this coordination, as follows:

- Coordination should concern specific cases pending before the NCAs;
- Coordination does not affect the right of each NCA to an independent determination of the case; and
- Cooperating NCAs should avoid conflicting actions or the acceptance of divergent obligations or conditions and reduce duplication of effort and costs in proceedings.

As indicated in the Recommendation, coordination may include:

- providing information on deadlines in the proceedings and the deadline for concluding the case;
- agreeing on a timeframe for proceedings;
- requesting parties to provide information on confidentiality exemptions to the cooperating NCAs;
- coordinating and discussing the analyses carried out;
- coordinating the design and implementation of conditions or commitments that offset the competition risks identified; and

49 This is explained in Section 8.2.

- requiring the parties to the proceedings to inform the NCAs about the existence of an obligation to notify mergers in other jurisdictions.

The application of any of the indicated possibilities for the coordination of administrative acts during proceedings depends exclusively on the will of the NCAs and the nature of the case. The OECD observes that network members undertake coordination efforts.[50]

Coordination may involve jointly elaborated and disseminated questionnaires – for example, joint questionnaires sent out by all NCAs concerned that need be answered only once in a single response, and that may be submitted to only a single NCA, which takes the lead. This possibility was discussed at the EU MWG when the best practices for cooperation on multi-jurisdictional mergers were prepared. However, it was rejected due to the tight deadlines in merger control proceedings and the linguistic challenges that common questionnaires would pose.[51] Perhaps such joint efforts would be more appropriate in relation to investigations into cross-border cartels. However, such joint investigations would require a formal legal basis in order to guarantee the effectiveness and legality of such measures.

The ICN has also issued a recommendation on merger notification procedures.[52] In this recommendation, the whole of Chapter X is devoted to the coordination of NCAs' actions. First, it assumes that coordination of merger review processes is justified if a merger simultaneously raises market issues in the cooperating jurisdictions (Part X.A). The aim of this coordination should be to achieve mutually agreed – or at least non-contravening – results of national proceedings. At the same time, such coordination is entirely voluntary; and even after engaging in the coordination of proceedings, each NCA remains competent to resolve the case on its own. More importantly, such involvement does not impose an obligation to take into account the effects of a merger beyond the borders of a given jurisdiction. Second, coordination should take place in accordance with the applicable law, the available legal instruments and prevailing views (Part X.B). This means that the NCAs involved must act in accordance with the international and national standards that apply to them, in particular as regards the protection of commercial information or legal professional privilege. The coordination of proceedings should be preceded by the establishment and formalisation of rules for coordination. This can be done on *an ad hoc* basis or in advance, within the

50 The OECD states that 'while the number of authorities with which Adherents co-operate has not increased significantly, the number of cases in which co-operation takes place experienced a steady increase. This could indicate that relationships between competition authorities are intensifying and prior experience and trust in the exchanges foster co-operation in more cases by the same pairs of authorities' – OECD (2022), International Co-operation on Competition Investigations and Proceedings: Progress in Implementing the 2014 OECD Recommendation, p. 48, https://www.oecd.org/daf/competition/international-cooperation-on-competitioninvestigations-and-proceedings-progress-in-implementing-the-2014-recommendation.htm (accessed 31 June 2022).

51 A. Bardong, 'Cooperation Between National Competition Authorities', p. 133.

52 ICN, Recommended Practices for Merger Notification Procedures.

framework of regional or continental TCNs. Third, the coordination of proceedings should be tailored to the needs of the particular transaction and the needs of the NCAs involved (Part X.C). Depending on the nature of the case and the evidentiary steps that need to be taken, coordination should include different forms of evidence and ways of resolving interim and main cases. Following this guidance, the NCAs should inform each other about mergers with cross-border effects at the earliest possible stage.

The ICN recommends that the initiation of coordination be preceded by a joint assessment of the actual existence of the cross-border effects of the merger. The methods of coordination in individual cases may include establishing contact points; agreeing on the content of administrative actions; harmonising the duration of individual actions and proceedings; agreeing on requests for information; sharing analyses that are conducted; and/or conducting joint evidentiary actions, such as hearing witnesses or holding joint meetings with the parties to the merger. An NCA that is engaged in coordination should not delay its final decision on a case due to ongoing proceedings in other jurisdictions, unless continued coordination is necessary for the development of common conditions or obligations for several jurisdictions. Fourth, NCAs should facilitate and encourage the involvement of the parties to a merger in the coordination of national proceedings (Part X.D). Indeed, smooth coordination depends equally on the cooperation of both the NCAs and the parties to the merger. On the part of undertakings, this may include the granting of confidentiality waivers or the simultaneous submission of notifications and requests for information. At the same time, the parties to the proceedings should be aware of the coordination taking place, and should be familiar with the scope of each other's arrangements and the methods that the NCAs are using to cooperate. It is important to stress that the NCAs may encourage, but may not compel, undertakings to facilitate the coordination of national proceedings; and in particular, they may not oblige undertakings to grant automatic confidentiality waivers.

One interesting form of coordination is the preparation of a common notification form for multi-jurisdictional mergers. Such a form was prepared by NCAs from Germany, France and the United Kingdom. However, it proved neither popular nor effective. In almost all cases, merging parties preferred not to use the form, because the requirements for a complete notification under German law are much lower than what is required in the common form.[53] This is one of the reasons why this approach was not adopted by the EU MWG when preparing the best practices for notification of multi-jurisdictional mergers.[54] There are no current plans for the adoption of such a common notification form, even for the EU countries.

The coordination and reconciliation of administrative actions by NCAs can be an effective mechanism of network cooperation. This enables all NCAs concerned to maintain a common position towards undertakings, as the proceedings they are conducting will be at a similar stage. The coordination of procedural activities

53 A. Bardong, 'Cooperation Between National Competition Authorities', p. 139.
54 Ibid.

does not detract from the independence of the cooperating NCAs. Ultimately, each collects and analyses evidence on its own. However, the coordination of procedural steps may facilitate the exchange of evidence (with guarantees for the protection of commercial secrets), and may facilitate the next step in international networking.

7.2.5 Coordination and reconciliation of administrative decisions of NCAs

The international coordination of proceedings conducted by NCAs need not be confined to the evidence phase of administrative proceedings, but may also include the decision-making phase. A special form of international cooperation of NCAs, which deserves to be singled out and discussed separately, is the coordination and reconciliation of administrative actions and decisions. In practice, two forms of coordination in this respect are apparent: voluntary coordination based on international *soft law* documents adopted by the OECD or the ICN; and mandatory coordination resulting from universally binding provisions of EU law within the ECN.

Both the 2014 OECD Recommendation and the ICN Recommendation on Merger Notification Procedures point to the need for the coordination of determinations as a natural consequence of the coordination of evidentiary steps. At the same time, both documents emphasise the voluntary nature of these arrangements. It is worth noting that coordination is justified primarily in relation to the issuance of conditional decisions or the acceptance of commitments from undertakings. Decisions not to declare the existence of an anti-competitive practice or to approve a merger may also be the subject of inter-NCA coordination; but their absence generally has no particular legal or political consequences. It may be preferable to agree on a decision to declare the existence of an anti-competitive practice and impose a penalty, or a decision to prohibit a merger. The prohibition of a merger in one country will generally result in the collapse of the merger, unless it proves possible to modify the deal to exclude the jurisdiction in question from the transaction. Similarly, the punishment of anti-competitive behaviour will depend to a large extent on the punishment policy of the relevant NCAs, which significantly limits the possibility of effective coordination. At the same time, in this situation coordination will be justified in the case of conditional decisions and decisions accepting commitments from undertakings. In both cases, the aim is to modify the merger or the behaviour of undertakings. In both situations, there is a *de facto* negotiation of the content of the administrative act, which ensures that the interests and approaches of all parties and bodies involved are taken into account. The adoption of harmonised conditions or commitments facilitates their monitoring, ensures a uniform level of competition protection in all cooperating jurisdictions, and provides legal certainty for undertakings. The aim of the agreement between the NCAs and the parties may be more ambitious (agreeing on the content of the conditions or commitments) or less ambitious (adopting non-contradictory – internationally agreed – conditions or commitments). However, this objective will depend on the will of the NCAs involved and the nature of the case.

It seems that the basic objective should be the minimum one, on the understanding that in favourable circumstances, the interacting NCAs can always deepen the scope of their agreement.

The coordination of determinations is largely voluntary. The ICN Recommendation on merger notification procedures in Point X.E indicates that the coordinating NCAs should shape the conditions in such a way that the identified restriction of competition within the territory of a given jurisdiction is eliminated, while at the same time not rendering ineffective the conditions agreed upon in other jurisdictions. The conditions agreed by NCAs will not always be identical. Some conditions may be specific to the risks identified in a given market and their imposition by another NCA may be considered disproportionate. When shaping these conditions, it is important to take into account the conditions agreed by other NCAs – in particular, if they simultaneously remove the competition concerns in a number of national markets. Agreeing modalities through cooperation among NCAs can also significantly speed up the completion of proceedings in all jurisdictions. More advanced conditionality arrangements may involve the harmonised supervision of their implementation – for example, the imposition of the same deadlines for the establishment of common trustees or standardised reporting of the implementation of the conditions. These guidelines are reiterated in the ICN Merger Remedies Guide.[55]

The coordination of the administrative decisions of NCAs may occasionally be mandatory. When issuing a decision under Article 101 or 102 TFEU, under the provisions of Regulation 1/2003, EU NCAs must coordinate their content with the European Commission. According to Article 11(4) of the Regulation:

> no later than 30 days before the adoption of a decision requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block exemption Regulation, the competition authorities of the Member States shall inform the Commission. To that effect, they shall provide the Commission with a summary of the case, the envisaged decision or, in the absence thereof, any other document indicating the proposed course of action. This information may also be made available to the competition authorities of the other Member States. At the request of the Commission, the acting competition authority shall make available to the Commission other documents it holds which are necessary for the assessment of the case.

There is a general presumption that the disclosure of documents exchanged between the European Commission and an NCA pursuant to Article 11(4) of Regulation 1/2003 undermines the protection of the commercial interests of the undertakings concerned, as well as the protection of the purpose of the investigation by an NCA.[56] This presumption is crucial for the effectiveness of cooperation

55 ICN, Merger Remedies Guide, 2016, https://www.internationalcompetitionnetwork.org/portfolio/merger-remedies-guide/ (accessed 31 July 2021).

56 V. Pereira, J. Capiau, A. Sinclair, 'Union de Almacenistas de Hierros de Espana', p. 119.

and increases mutual trust between ECN members. In administrative practice, it can be observed that contact between the European Commission and NCAs dealing with a case is continuous. This follows directly from Article 11(5) of the Regulation, which provides that the Commission and NCAs may consult each other on an ongoing basis on all issues relating to the application of EU law. The draft decision sent to the Commission should therefore come as no surprise to it. Although not explicitly specified in this provision, the sending of a draft decision may be accompanied by the initiation of detailed discussions on it and there may be suggestions for its modification. In most cases, in accordance with the principle of loyal cooperation, NCAs and the Commission try to agree on a compromise wording for the decision. Importantly, the Commission cannot impose its position on NCAs and oblige them to change the content of the draft in a certain way. This means that the consultation has no binding legal effect on NCAs.[57] However, the Commission can always exercise the most far-reaching option and, if it considers it justified, take over the case pursuant to Article 11(6) of Regulation 1/2003. The Commission itself considers the use of this measure – regarded as a kind of 'nuclear option' – to be exceptional, as evidenced by the fact that it has laid down detailed rules for its application.

In principle, agreement on the content of the settlement between NCAs is voluntary. The mechanism in Regulation 1/2003 providing for mandatory coordination must be regarded as exceptional and justified by the decentralised application of EU competition rules and the Commission's duty to ensure their uniform application. The legitimacy of coordinating NCA decisions will not apply to all decisions, but only to selected types – in particular, those which involve a negotiated settlement procedure or which provide the NCA with a wide margin of discretion. In other cases, NCAs may cooperate, but will ultimately have to make a ruling in accordance with national rules – including those concerning competition effects that fall within the territorial jurisdiction of the relevant NCA.

7.2.6 Allocation of cases between national and transnational competition authorities

An equally important issue concerning cooperation of NCAs that affects their rights and obligations is the allocation of cases between national and transnational competition authorities. Two issues should be noted here: the determination of the jurisdiction of national and transnational competition authorities; and the referral and takeover of cases between NCAs. The referral and reassignment of cases is not merely of a technical nature, but modifies the NCA's jurisdiction and is thus of fundamental importance to the system. It constitutes a binding

57 J. Bourgeois, 'Consultations between National Competition Authorities and the European Commission in a Decentralised System of EC Competition Law Enforcement', in C.-D. Ehlermann, I. Atanasiu (eds), *European Competition Law Annual 2002,* pp. 430–431.

interference not only with the administrative jurisdiction of NCAs, but also with national sovereignty exercised by these authorities.

In relation to the first issue, each country can independently and sovereignly determine its national competition jurisdiction. This means that each national legislature can determine which competition cases fall within the jurisdiction of its NCA. Thus, the same cases can simultaneously fall within the competition jurisdiction of multiple states. Although this may be criticised by businesses (especially those operating in many countries simultaneously), it is a natural situation resulting from the sovereignty of states. It is also the basic justification for the development of international cooperation.

The main limitation of the freedom of national legislatures to determine the jurisdiction of NCAs are binding provisions of transnational and international law. In this respect, European law – and in particular Regulations 139/2004 and 1/2003 – are of key importance for EU member states. The former establishes the European merger control regime and sets out binding rules delimiting the competence of the European Commission and of NCAs. Currently, the European merger control system is based on exclusive jurisdiction and strict rules on the allocation of cases among national and European competition authorities.[58] Article 1 of Regulation 139/2004 defines which mergers have a Community dimension, for which the European Commission has exclusive competence. Such transactions must be notified to the Commission and the application of national rules is excluded, even if the merger meets the formal conditions for notification to NCAs. Regulation 139/2004 upholds the strict division of competences between the Commission and NCAs with regard to merger control, excluding situations in which these authorities may be competent to deal with a given case simultaneously. Meanwhile, however, the European legislature and the national legislatures remain independent of each other as regards the autonomous determination of the competence of the competition authorities and the scope of the notification obligation. For this reason, it may be assumed that while the European legislature cannot limit the freedom of, for example, the Polish legislature to determine the scope of the notification obligation, the provisions of Regulation 139/2004 nonetheless effectively limit the application of the Polish merger control regulations, and in this sense the autonomy of the Polish legislature is limited.

In contrast, Regulation 1/2003 provides for different case allocation rules, introducing a decentralised system for the application of European competition law to anti-competitive practices. The members of the ECN have both the right and the obligation to apply national and European rules to a case in parallel (provided that the conditions set out in these rules are fulfilled). This has also made it necessary to define the relationship between national and European rules. According to Article 3(2) of Regulation 1/2003:

58 L.M. Davison, 'EC Merger Control. From Separate Jurisdictional Zones to a Cooperation Based Architecture?', *LLR*, vol. 25, iss. 1, 2004, pp. 49 ff.

> the application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(1) of the Treaty, or which fulfil the conditions of Article 81(3) of the Treaty or which are covered by a Regulation for the application of Article 81(3) of the Treaty. Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.

This provision limits the discretion of the national legislature primarily with regard to the sanctioning of anti-competitive agreements, introducing the principle that national rules may not be more restrictive than European rules. Importantly, however, this limitation does not apply to rules sanctioning the abuse of a dominant position; in this respect, national rules may be stricter than EU rules. Finally, the European rules on anti-competitive practices do not limit the national legislature's freedom to shape merger control rules or other special provisions outside the scope of competition law (Article 3(3) of Regulation 1/2003). Apart from these provisions of European law, there are no other provisions of international or transnational law that influence the allocation of antitrust cases and the competence of the Polish NCA.

These principles of case allocation are not absolute; EU law provides for their relativity, introducing a mechanism for the referral and takeover of cases between competition authorities. Both Regulation 139/2004 and Regulation 1/2003 provide for the possibility to modify the original jurisdiction of an authority and for the European Commission to take over a case or refer it to an NCA (for merger cases only). Currently, such modification is possible only within the framework of the application of European law between the European Commission and the EU NCAs. Therefore, there is no formal possibility to transfer competition jurisdiction between EU NCAs. However, to a certain extent, this is facilitated by the aforementioned possibility to suspend or discontinue antitrust proceedings relating to anti-competitive practices where a case is pending before another NCA. It is worth noting in this context that some have argued for changes to the European merger control system to promote greater decentralisation than that outlined by Regulation 1/2003.[59] However, it seems that the current system of exclusive jurisdiction is better suited to the specifics of merger cases – not to mention the fact that such changes would certainly not be supported by member states.

The rules on the referral and takeover of merger cases between the European Commission and the EU NCAs are set out in Articles 4, 9 and 22 of Regulation 139/2004. They are supplemented by European Commission guidelines.[60] They

59 Ibid, pp. 68 ff.

60 Commission Notice on Case Referral in respect of concentrations, OJ C 56 [2005], pp. 2–23.

allow for the modification of the original jurisdiction of the authorities both during the pre-notification phase (Article 4) and after the formal notification of cases (Articles 9 and 22). Referrals are possible in both directions, but the grounds for referral to NCAs are more complicated; and moreover, it is the European Commission itself that decides whether to take over or refer a merger case – NCAs (and undertakings, under Article 4 only) can only make requests to the Commission to do so. A referral can only take place if the authority in question recognises the relevant transaction as a merger in light of the applicable rules.[61] Thus, for example, a referral to the European Commission cannot be made in respect of a transaction which is not deemed to be a merger under Regulation 139/2004. However, NCAs, cooperating within TCNs, have developed additional rules which facilitate the referral and takeover of merger cases. Key examples include the ECA rules on the application by NCAs of Articles 4(5) and 22 of the EUMR and the EU MWG's best practices on cooperation between NCAs on merger control. These rules, which are of a soft law nature, substantially supplement the provisions of the Regulation and the European Commission guidelines. Although formally neither the ECA nor the MWG applies the provisions of Regulation 139/2004, by establishing forms of cooperation among EU NCAs, they allow NCAs to define the rules on cooperation in the application of European law.

Regulation 1/2003 provides for even more far-reaching cooperation in the allocation of cases. As previously discussed, it introduced a decentralised system for applying the Treaty competition rules, which all EU NCAs can apply in parallel. The only exception is if the European Commission has already initiated proceedings, in which case the NCAs are not competent to conduct proceedings. The application of the Treaty competition rules within a decentralised system thus requires effective methods of cooperation between the members of the ECN. For this reason, Article 11(1) of the Regulation provides that the 'Commission and the competition authorities of the Member States shall apply the EC competition rules in close cooperation'. Most of the rules on cooperation have already been discussed, so the remaining rules which may affect the NCAs' jurisdiction are presented here. First, Regulation 1/2003 sets out no binding rules on which members of the ECN should deal with a case. This omission has been the subject of criticism since the inception of the ECN.[62] Only the ECN Notice provides some guidance. The basic premise for cooperation on case allocation is that 'each network member retains full discretion in deciding whether or not to investigate a case'.[63] Another assumption is that 'in most instances the authority that receives a complaint or starts an ex-officio procedure will remain in charge of the case'. However, 're-allocation of a case would only be envisaged at the outset of a procedure where either that authority considered that it was not well placed to act or

61 Each legislature may autonomously determine the types of transactions that are notifiable in a given jurisdiction.

62 A. Schwab, Ch. Steinle, 'Pitfalls of the European Competition Network. Why Better Protection of Leniency Applicants and Legal Regulation of Case Allocation Is Needed', *ECLR*, iss. 9, 2008, p. 523.

63 Point 2.1.5, ECN Notice.

where other authorities also considered themselves well placed to act'.[64] Further considerations in relation to the allocation of cases are that one NCA should deal with the case; and that the allocation should take place quickly and efficiently, and should not hold up ongoing proceedings. If a case needs to be allocated to another NCA, this should be done within two months of the date on which the first information pursuant to Article 11 of Regulation 1/2003 is communicated to the network. At the same time, the Notice lists the criteria that should guide ECN members when allocating cases:

> An authority can be considered to be well placed to deal with a case if the following three cumulative conditions are met:
>
> - the agreement or practice has substantial direct actual or foreseeable effects on competition within its territory, is implemented within or originates from its territory;
> - the authority is able to effectively bring to an end the entire infringement, i.e. it can adopt a cease-and-desist order the effect of which will be sufficient to bring an end to the infringement and it can, where appropriate, sanction the infringement adequately;
> - it can gather, possibly with the assistance of other authorities, the evidence required to prove the infringement.[65]

These provisions set out objective rules for the allocation of cases among members of the ECN. In contrast to the merger control system under Regulation 1/2003, the allocation of a case to one NCA does not divest other NCAs of jurisdiction; although the Regulation does afford them the procedural possibility to refuse to initiate, suspend or discontinue proceedings once the case has been allocated to another ECN member. Importantly, these arrangements are voluntary; the only exception is when the European Commission decides to deal with a case. This jurisdictional discretion of NCAs is reinforced by the jurisprudence of the EU courts and by the ECN+ Directive. First, the General Court clarified that the Commission or an NCA may rely on Article 13 of Regulation 1/2003 to reject a complaint that has previously been rejected by another authority on priority grounds, as long as that previous rejection was carried out in the light of EU competition laws.[66] This limits a potential complainant to judicial remedies should it wish to challenge the jurisdictional decision of a ECN member.[67] Second, the ECN+ Directive empowers EU NCAs to set their own priorities. Therefore, all EU NCAs should be competent to decide on their priorities, which may serve as a basis for jurisdictional decisions. Such decisions may lead to the rejection of a

64 Point 2.1.6, ECN Notice.
65 Point 2.1.8, ECN Notice.
66 Case T-355/13, *easyJet Airline v Commission*, 21 January 2015, OJ C 73/25, 2 March 2015.
67 L.S. West, 'Easyjet v Commission: Complainants not Entitled to a Second Bite', *JECLP*, 2015, vol. 6, iss. 7, p. 501.

complaint if the case does not fall within the priorities set by the NCA. The competence to set priorities is an important element of strengthening the independence of EU NCAs.[68]

As can be seen from the previous considerations, NCAs have very broad information obligations when conducting proceedings on Treaty grounds. At any stage, the European Commission may decide to take over a case, regardless of whether it is being handled by one or more ECN members. According to Article 11(6) of Regulation 1/2003:

> the initiation by the Commission of proceedings for the adoption of a decision under Chapter III shall relieve the competition authorities of the Member States of their competence to apply Articles 81 and 82 of the Treaty. If a competition authority of a Member State is already acting on a case, the Commission shall only initiate proceedings after consulting with that national competition authority.

Thus, until a decision has been issued by an NCA, the Commission is always entitled to take over a case; unlike in the case of merger control, it does not then issue a decision, but initiates proceedings. The Commission's only obligation concerns prior consultation, but the result of this consultation is in no way binding. This provision is an *ultima ratio* and contradicts the idea of a network of authorities. However, the ECN is a specific network in this respect, since the position of the Commission in certain situations is privileged against other network members (ie, EU NCAs). It is worth noting here that the Commission itself has defined the situations in which it intends to make use of Article 11(6) It has therefore established that:

> [T]he Commission will in principle only apply Article 11(6) of the Council Regulation if one of the following situations arises:
>
> - Network members envisage conflicting decisions in the same case.
> - Network members envisage a decision which is obviously in conflict with consolidated case law; the standards defined in the judgements of the Community courts and in previous decisions and regulations of the Commission should serve as a yardstick; concerning the assessment of the

68 However, the ability to set priorities by NCAs may have an adverse effect on competition enforcement in general. Although priority setting may be regarded as a useful jurisdictional tool, it leads to an increase in discretionary non-enforcement decisions which have a detrimental impact on the effectiveness, uniformity and legal certainty of EU competition law enforcement. Instead of engaging in a complex balancing of competition and public policy considerations, the NCAs have simply refrained from pursuing cases against anti-competitive agreements that raise public policy questions or have settled those cases by accepting negotiated remedies. See O. Brook, 'Priority Setting as a Double-Edged Sword: How Modernization Strengthened the Role of Public Policy', *JCLE,* vol. 16, iss. 4, 2020, pp. 458–487.

facts (e.g. market definition), only a significant divergence will trigger an intervention of the Commission;
- Network member(s) is (are) unduly drawing out proceedings in the case;
- There is a need to adopt a Commission decision to develop Community competition policy in particular when a similar competition issue arises in several Member States or to ensure effective enforcement;
- The NCA(s) concerned do not object.[69]

At the same time, the Commission committed in the ECN Notice to inform ECN members of its intention to apply Article 11(6) well in advance, in order to give them the opportunity to request an Advisory Committee meeting on the case before the Commission opens proceedings. At the same time, the Commission also committed to explain in writing to the NCA concerned and to other ECN members the reasons for applying Article 11(6) if the NCA has already acted on the case.[70] These additional obligations demonstrate that this provision is regarded as a far-reaching solution and the Commission is careful not to abuse it. Indeed, even in the most obvious case of reservation platforms, where there were conflicting decisions of NCAs and where the application of Article 11(6) seemed to be most justified,[71] the Commission decided not to use this measure.[72]

The case allocation rules indicate that this problem will arise only within administrative networks in which members apply the same rules in parallel (Regulation 1/2003) or to which distinct rules apply simultaneously (Regulation 139/2004). The issue can thus arise only within the framework of integrated unions of states, such as the European Union. At the same time, it is clear how important network cooperation is in the application of these regulations. It allows for the optimal allocation of cases and at the same time ensures that the rights of all members of the network are protected.

7.3 Concluding remarks

Developed international cooperation among NCAs in TCNs has today become a standard. Informal developed cooperation is common to all networks. This naturally evolves from soft cooperation, and addresses the practical needs of NCAs in

69 Point 3.2.54, ECN Notice.

70 Point 22, CoE, Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities, Interinstitutional File: 2000/0243 (CNS), http://data.consilium.europa.eu/doc/document/ST-15435-2002-ADD-1/en/pdf (accessed 31 July 2021).

71 See EC, Report on the Monitoring Exercise Carried Out in the Online Hotel Booking Sector by EU Competition Authorities in 2016, http://ec.europa.eu/competition/ecn/hotel_monitoring_report_en.pdf (accessed 31 July 2021).

72 Meanwhile, the heads of NCAs that make up the ECN issued a statement stressing the need to agree positions in advance to prevent conflicting decisions by network members – EC, Outcome of the meeting of ECN DGs on 17 February 2017, http://ec.europa.eu/competition/antitrust/ECN_meeting_outcome_17022017.pdf (accessed 31 July 2021).

handling competition cases and developing national competition policies. The intensity of cooperation within networks may vary between jurisdictions. Some general research on TCNs suggests that states with a similar capacity were more likely to interact, and that overall there was no significant exchange between lower and higher-capacity members in order to improve regulatory capacity.[73] However, in principle, TCNs are voluntary and flexible cooperation mechanisms, and provide a level playing field for all NCAs involved; it is thus up to the individual NCAs and their leaderships as to how committed they are to cooperation. Moreover, a specific study on the most advanced TCN – the ECN – revealed that its internal structure is configured in such a way that it extends opportunities to all members, and that resources and expertise are exchanged informally between networks members.[74]

For advanced administrative networks, developed formal cooperation is crucial to safeguard the enforcement of applicable competition laws. These networks (eg, the ECN) involve cooperation that is closely related to the execution of competition jurisdiction. The distinctive feature of such cooperation is the existence of an unequivocal legal basis to undertake such action: the timing, scope, manner and/or content of such cooperation is determined in an agreement or other legal instrument.[75] This basis allows for much more elaborate and sophisticated rules, in comparison to informal cooperation guidelines. There is also very little room for discretion on the part of NCAs when the rights and obligations of third parties are at stake. Many advanced cooperation actions are subject to either administrative or judicial verification. Some TCNs will probably never reach such a level of formal developed cooperation, for political and legal reasons. Although developed cooperation should be seen as a great achievement of intensified international cooperation among NCAs, there is still room for further action, as discussed in the following chapter.

73 E. Mastenbroek, R. Schrama, D. Sindbjerg Martinsen, 'The Political Drivers of Information Exchange: Explaining Interactions in the European Migration Network', *JEPP*, vol. 29, iss. 10, 2022, p. 1670.

74 F.P. Vantaggiato, H. Kassim, K. Wright, 'Internal Network Structures', p. 575.

75 V. Demedts, *The Future of International Competition Law Enforcement*, p. 40.

8 Enhanced competition-related international cooperation within transnational networks

Soft and developed international cooperation has gradually become standard for most members of transnational competition networks (TCNs). However, there have been calls to strengthen international cooperation, both by developing existing forms of cooperation and by introducing new, more advanced and innovative ones. Proponents assert that enhanced cooperation among national competition authorities (NCAs) would:

- minimise duplication and maximise the efficiency of NCAs;
- impose no additional costs or burdens on companies;
- facilitate agreement on priorities such as cartels, while avoiding areas in which cooperation is difficult; and
- make the most effective use of all available resources.[1]

Furthermore, such cooperation could go beyond interactions between NCAs to include other actors that are involved in competition enforcement, such as courts and parliaments. Therefore, the title of this chapter reflects the broader range that it covers in comparison to previous chapters.

The Organisation for Economic Co-operation and Development (OECD) has outlined possible new fields for enhanced administrative cooperation between NCAs.[2] However, this initial proposal could be extended further to include:

- one-stop shop models (eg, for leniency or markers);
- the appointment of a lead jurisdiction in cross-border cases;
- joint investigative teams and cross-appointments;
- the recognition of decisions made by NCAs or courts in other jurisdictions;

1 J. Temple Lang, *Aims of Enhanced International Cooperation in Competition Cases*, DAF/COMP/WP3(2014)7, OECD, 28 May 2014, p. 2, http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=daf/comp/wp3(2014)7&doclanguage=en (accessed 4 February 2022).

2 OECD, Executive Summary of the Hearing on Enhanced Enforcement Co-Operation, 7 November 2014, p. 3, http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/M(2014)2/ANN3/FINAL&doclanguage=en (accessed 4 February 2022).

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- the settlement of disputes concerning international cooperation between NCAs;
- cooperation at the judicial level; and
- cooperation at the parliamentary level.

These forms of international cooperation of NCAs could serve as a starting point for a discussion on enhanced enforcement cooperation. They are discussed in this chapter in detail, together with an indication of the possible legal basis for their introduction in the national legal order and an assessment of the legitimacy of such regulations. The chapter pays particular attention to the provisions of the ECN+ Directive, which has already implemented some of these forms of enhanced cooperation. When analysing enhanced competition-related international cooperation, it is worth mentioning that it may cover other institutions in addition to NCAs, such as courts and parliaments. The chapter suggests that these enhanced forms of cooperation could progress based on transnational networks of NCAs, courts and/or parliaments.

8.1 Introduction of a one-stop shop model (eg, for leniency applications or markers)

One form of enhanced cooperation that is strongly advocated by undertakings is a one-stop shop model, particularly in relation to leniency applications and markers. The basic premise of this system is that in certain situations, competition regimes rely on requests or notifications from undertakings – primarily merger notifications and leniency applications. These notifications become particularly cumbersome in multi-jurisdictional cases, and it is in this context that the creation of a single-jurisdiction system is advocated.[3] Under such a system, despite the multi-jurisdictional character of a case, the undertaking would submit a single application to one NCA which would have effect with regard to all other NCAs competent in the case. This system could be shaped in different ways. For example, it could include the establishment of an international leniency agency entitled to receive and assess leniency applications submitted by international cartels. Alternatively, a less intrusive version would be an international marker management committee. Such an agency could serve as a single point of first contact for multi-jurisdictional leniency applicants, competent to issue a global marker according to multilaterally agreed requirements.[4] This would not mean the end of cooperation between NCAs in a given case, but rather its beginning. Depending on the specific rules of a given system, the NCA handling the case would share all information with the other cooperating NCAs, which could then express their views on the case.

On a theoretical level, a single-jurisdiction system has many advantages. First, it would reduce the costs of case handling for both NCAs and the undertakings

3 J.M. Taladay, 'Time for a Global "One-Stop Shop" for Leniency Markers', *Antitrust*, vol. 27, iss. 1, 2012, pp. 43 ff.

4 T. Obersteiner, 'International Antitrust Litigation: How to Manage Multijurisdictional Leniency Applications', *JECLP*, vol. 4, iss. 1, 2013, p. 28.

involved. For NCAs, the system would eliminate repetitive procedural steps and ensure that all NCAs could access all available information, which in the case of multiple applications can be fragmented and available only in selected jurisdictions. With a single-jurisdiction system, one NCA would receive all information at once, which it would then share with all NCAs concerned. This would facilitate a factual and constructive discussion in which all cooperating NCAs had access to all available information and could evaluate it independently. Such cooperation would streamline many procedures and allow for one consistent assessment of the application. Meanwhile, a single-jurisdiction system would significantly reduce costs for undertakings, which would need to prepare only one notification, work within one legal system and respond to one rather than multiple NCAs. The undertaking would receive one binding answer, avoiding divergent assessments and increasing the transparency and legal certainty of the whole procedure.[5]

A single-jurisdiction regime could apply in situations where undertakings are required to file an application with NCA in order to obtain certain rights. In the context of competition enforcement, this means that a single-jurisdiction regime would be useful for leniency applications and concentration notifications. The proliferation of leniency and merger control regimes has meant that undertakings must often make multiple applications to NCAs regarding the same case. In relation to leniency applications, the need to make multiple such requests at the same time and under different national rules can lead to legal uncertainty. This applies in particular to what is known as the 'marker system'. This system allows an undertaking to reserve a place in the leniency queue for a certain period, during which it collects additional evidence to supplement its leniency application.[6] This reservation requires agreement with the relevant NCA and is made for a strictly specified period on the condition that further evidence will be submitted. As a result, the applicant receives confirmation of the reservation of its place in the leniency system (marker), which provides legal certainty and clarity as to a possible reduction in the penalty.[7] The situation becomes more complicated when applications are submitted to several NCAs: it may turn out that an applicant cannot count on securing the same place (marker) in all jurisdictions, which may discourage it from submitting a leniency application at all. The solution is a single-jurisdiction system in which the application is submitted to one NCA with effect for all. A single-jurisdiction system for reserving a leniency marker would be based on three assumptions:

5 J. Pecman, D. D. Pham, 'The Next Frontier of International Cooperation in Competition Enforcement', in P. Lugard, D. Anderson (eds), *The ICN at Twenty*, p. 305.

6 The leniency system operates on a first come, first served basis, which in simple terms means that the first undertaking to reveal a cartel can expect the penalty to be fully waived, while each subsequent undertaking can expect only a certain reduction in the penalty. Therefore, the place in the queue is decisive for each applicant.

7 ICN, 'Drafting and Implementing an Effective Leniency Policy', in *Anti-Cartel Enforcement Manual*, New York 2014, p. 11, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_ACEMLeniency.pdf (accessed 4 February 2022).

- the voluntary participation of NCAs;
- the voluntary participation of undertakings, which could choose either to avail of it or to rely on national legislation; and
- its availability for the first applicant only; all others must use national schemes.[8]

In the European Union, a form of single-jurisdiction system for leniency applications is set out in the ECN+ Directive. This is possible because the Directive provides for the unification of the leniency regimes of European Competition Network (ECN) members.[9] According to Article 22(3):

> where the Commission receives a full application and national competition authorities receive summary applications in relation to the same alleged cartel, the Commission shall be the main interlocutor of the applicant, in the period before clarity has been gained as to whether the Commission intends to pursue the case in whole or in part, in particular in providing instructions to the applicant on the conduct of any further internal investigations.

This means that, after submitting a request to the Commission, the applicant makes simplified submissions to the NCAs, with effect from the date of notification of the request to the Commission; the Commission then decides whether to pursue the case itself or to leave it up to NCAs to deal with all or part of the case.

A second context in which a single-jurisdiction system would usefully apply is within regional merger control systems. Under these systems, a transnational organisation imposes specific rules on the control of concentrations, specifying which types of concentrations must be notified to it. As a result, businesses no longer submit applications to the member state NCAs, but deliver a single notification to the designated authority. Such solutions are applied by, among others, the European Union[10] and the Common Market for Eastern and Southern Africa (COMESA).[11] This system of one jurisdiction for multi-jurisdictional concentrations significantly reduces costs for both NCAs and undertakings, while also providing the latter with greater legal certainty and the predictability of a settlement.

A single-jurisdiction system can significantly improve the handling of certain multi-jurisdictional competition cases. By their nature, these are limited to cases in which undertakings must submit notifications, which makes them suitable only for

8 OECD, Use of Markers in Leniency Programmes, 24 March 2015, p. 25, http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2014)9&doclanguage=en (accessed 4 February 2022).

9 This harmonisation consists in transferring the basic assumptions of the ECN recommendation for a model leniency system into hard law (ECN+ Directive). This formalisation of soft law was long awaited – see C. Osti, 'DHL Express (Italy) v Commission: Guidance on Parallel Immunity/Leniency Applications', *JECLP*, vol. 7, iss. 7, 2016, p. 461.

10 Regulation 139/2004.

11 The COMESA Competition Regulations, *COMESA Official Gazette*, vol. 9, iss. 2, 2004.

leniency applications and merger notifications. The application of this system is conditional either on the unification of rules among members of the relevant TCN that is implementing the system or on the adoption of generally applicable rules at the level of the transnational organisation to which the TCN aligns itself. In practice, this means that it is highly unlikely that a single-jurisdiction system could apply outside of transnational organisations and the networks within them.

8.2 Designation of a lead national jurisdiction for transnational cases

Parallel proceedings conducted by several NCAs may result in unnecessary expenses for undertakings due to the duplication of procedural steps or costs, and above all to divergent administrative decisions. The previously discussed methods of cooperation involving the agreement and coordination of procedural actions, and even the content of administrative decisions, may turn out to be insufficient. For this reason, the literature on the subject has put forward the idea of introducing a new form of cooperation among NCAs based on the concept of a lead jurisdiction. The basic idea behind this concept, in the context of a multi-jurisdictional case, is to identify the jurisdiction that is best empowered to deal with the case and appoint it to conduct the case in the name and on behalf of all NCAs involved. Once a lead jurisdiction has been selected and appointed, the case will be handled in accordance with the laws and procedures of that jurisdiction. The lead jurisdiction should have a substantial interest in conducting the proceedings, but also the necessary competence and resources to conduct the proceedings with the assistance of the other NCAs; and it should be able to take into account multiple national viewpoints and interests when deciding on the outcome.[12]

The lead jurisdiction system could be applied on a voluntary or mandatory basis.[13] In the voluntary mode, the lead NCA would conduct the proceedings on behalf of all NCAs involved and prepare a recommendation for resolution of the case. However, this recommendation would not be binding on the other NCAs – each NCA would independently assess the case and issue its own decision. In the mandatory mode, the lead NCA would be equipped with full jurisdiction to issue a binding settlement of the case in the name and on behalf of all NCAs involved. In this system, the risk of parallel proceedings and decisions would be completely eliminated.

This system could simply involve horizontal cooperation among the NCAs concerned; but it could also operate through a transnational or international organisation. This organisation would assume the decisive role in designating the lead jurisdiction; it would not prosecute or settle the case itself. In a system with a transnational or international organisation, the national jurisdictions would pre-define the

12 A. Capobianco, A. Nagy, 'Developments in International Enforcement Co-operation in the Competition Field', *JECLP*, vol. 7, iss. 8, 2016, p. 579.

13 O. Budzinski, 'Towards Rationalizing Multiple Competition Policy Enforcement Procedures. The Role of Lead Jurisdiction Concepts', DAF/COMP/WP3(2014)6, OECD, 23 June 2014, pp. 3–5, http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=daf/comp/wp3(2014)6&doclanguage=en (accessed 4 February 2022).

criteria for choosing the lead jurisdiction and the powers of the organisation – for example, to supervise the lead jurisdiction or resolve conflicts between the concerned jurisdictions.

This system presents a number of challenges. Chief among them is the limitation of national sovereignty by allocating administrative jurisdiction to a foreign public administration. In addition, this system presents design challenges. First, the assumption of the ability to reconcile the interests of all national jurisdictions is highly optimistic. In practice, reconciling the conflicting interests of different countries may be difficult, if not impossible; and the decision of the lead authority may not prove satisfactory to anyone. Second, the lead authority will issue a decision in accordance with its own national laws. However, as the laws of all jurisdictions concerned may differ, the decision of the lead jurisdiction may have varying legal effects depending on the national system concerned or different competition harms relating to specific jurisdictions. Depending on the different competition harms identified, different national remedies may be desired and applicable. Third, there may also be a practical problem in identifying the lead jurisdiction. There may be a danger that too few regimes fulfil the criteria of serving as a lead jurisdiction, so that the same handful of big NCAs end up leading all cases.[14]

The international patent system established by the Patent Cooperation Treaty under the aegis of the World Intellectual Property Organization (WIPO) is one example of how such a system could operate in practice. Under this system, the applicant files a request with WIPO, which designates one of the national authorities as the international searching authority to carry out a search of patent databases internationally. Following this search, a report is presented which, although not binding on WIPO members, should be taken into account by each national patent office.

At the same time, it is worth pointing out that the EU Merger Working Group has rejected the possibility of introducing a system of a lead jurisdiction for multi-jurisdictional concentrations without a Community dimension. It has emphasised that each NCA must comply with its own laws and procedural requirements, and ultimately make its own assessment. Therefore, a lead authority could only assume an advisory and coordinating role.[15] This means that, without a fundamental change to the EU merger control system, the concept of a lead jurisdiction in national merger cases is not permissible.

The concept of a lead jurisdiction, although interesting from a theoretical point of view, does not seem to be achievable based on transnational cooperation of NCAs. The WIPO example concerns a different category of cases, and the scope of the lead jurisdiction's duties in that system is significantly narrower than it would have to be in competition cases. Also significantly, even in the international patent cooperation system, the report of the lead jurisdiction is not binding. The

14 O. Budzinski, 'Lead Jurisdiction Concepts: Prospects and Limits for Rationalizing International Competition Policy Enforcement', *Global Economy Journal*, vol. 18, iss. 2, 2018, pp. 7–9.

15 A. Bardong, 'Cooperation between National Competition Authorities', p. 137.

previously discussed negative aspects of the lead jurisdiction system concerning the limitation of sovereignty in the exercise of administrative jurisdiction and the risk of potential conflicting national interests mean that this system will likely remain a purely theoretical concept. It is difficult to imagine which states would agree to such a solution. The leading competition jurisdictions that set the tone for international cooperation and decide on the most important competition cases – such as the United States, the European Union, China, Brazil and Japan – do not seem willing to accept such a solution. Finally, even within the European Union, no such system has been decided upon, whether under Regulation 1/2003 or under Regulation 139/2004. Both regimes are based on the clear allocation of cases, with each competent NCA dealing with a case within its area of competence. Other NCAs may try to coordinate their decisions or take the decisions of other NCAs into account when issuing their own decisions; but each handles and decides the case on its own behalf.

8.3 Staff cooperation and the establishment of joint investigation teams or the cross-appointment of officials from different NCAs to investigation teams

The institutional framework for international cooperation can be further improved by strengthening personal ties and formal relationships between NCA officials. The least formalised form of cooperation concerns personal contacts between officials who know each other and can contact each other directly. This is the quickest way to obtain basic information and is often the key to determining whether cooperation is justified or possible in a given case. This may not involve the exchange of legally protected information, but it gives NCA officials an idea of the stage which the proceedings have reached and their foreign counterparts' general view of the case. This mechanism is proposed by the United Nations Conference on Trade and Development (UNCTAD), which advises members to engage in 'voluntary formal ad-hoc consultations'.[16] The use of official communication channels may not be as effective in this respect and is always much lengthier.

More advanced forms of cooperation observed in the activities of some NCAs from OECD countries include:

- the direct negotiation of acceptable terms with the parties to the concentration by authorised officials from all NCAs dealing with the case;
- the participation of officials from other NCAs handling the case in some evidentiary steps – for example, questioning a witness;
- joint discussions of the terms proposed by the parties to the concentration;
- joint discussions and validation of the econometric models used by NCAs in the same case; and
- joint evaluation of private expert reports submitted by the parties to the proceedings.[17]

16 P.M. Horna, 'How ICN and UNCTAD Can Work Together', pp. 336 ff.
17 OECD, Executive Summary of the Hearing on Enhanced Enforcement Co-operation, p. 7.

These forms of cooperation primarily require the prior waiver of confidentiality granted by the parties to the proceedings. This is not common, especially in the administrative practice of the Polish NCA – in merger control cases, the parties very rarely agree to release NCAs from confidentiality. A more serious problem may be the legal admissibility of many of the indicated actions under Polish law. First, it is doubtful whether the evidentiary activities conducted by the Polish NCA in another country could be deemed effective in the absence of a clear legal basis for them. These actions would be invalid under both national and international law. Similarly, the participation of representatives of foreign NCAs in evidentiary proceedings conducted by the Polish NCA would also be highly doubtful in the absence of a clear legal basis for such participation.[18] Second, it is highly unlikely that it would be permissible to formally determine the content of an administrative decision, or part thereof, through cooperation with foreign NCAs in the absence of a clear legal basis for this. It seems, however, that the creation of such possibilities should be legally permissible while guaranteeing the rights of the parties. In addition, the practice of the European Commission shows that discussing possible conditions, for example, with NCAs from the United States is not an exceptional situation; although these issues are regulated by agreements concluded by the European Union with foreign jurisdictions.[19] Third, the joint discussion and assessment of evidence is possible; although from a formal point of view, this would be an individual assessment of the Polish NCA coinciding with the assessment of the foreign NCA. All these activities occur in the practice of some NCAs; but in the current context, it would be desirable to make them more widespread and allow them as a rule, to enable NCAs to operate within a framework of international cooperation.

The most far-reaching form of staff cooperation is the creation of joint investigation teams or the exchange of officials by joining investigation teams. In specific

18 Such a basis is established in, for example, Article 22 of Regulation 1/2003, but only for officials of the European Commission.

19 In particular, we can mention here formal agreements concluded by the European Union with the United States (Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws – Exchange of interpretative letters with the Government of the United States of America, OJ L 95 [1995], pp. 47–52 and 98/386/EC; ECSC: Decision of the Council and of the Commission of 29 May 1998 concerning the conclusion of the Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws, OJ L 173 [1998], pp. 26–27); Switzerland (Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws, OJ L 347 [2014], pp. 3–9); South Korea (Agreement between the European Community and the Government of the Republic of Korea concerning cooperation on anti-competitive activities, OJ L 202 [2009], pp. 36–41); Japan (Agreement between the European Community and the Government of Japan concerning cooperation on anti-competitive activities – Agreed minute, OJ L 183 [2003], pp. 12–17); and Canada (Agreement between the European Communities and the Government of Canada regarding the application of their competition laws, OJ L 175 [1999], p. 49).

concentrations of particular relevance for certain member states, the European Commission allows for close cooperation with NCAs, and even the participation of NCA representatives in the Commission's evidentiary steps and other casework and discussions. However, the position of the Commission is specific, due to its transnational nature. In this context, it can be pointed out that when the ECN was being established, ideas were proposed for the creation of virtual teams to deal with cases that are simultaneously pending in several jurisdictions by the EU NCAs involved.[20] However, this possibility was not pursued and the ECN+ Directive did not introduce similar solutions. Meanwhile, such sophisticated cooperation in practice remains quite rare. One example is the 2010 agreement between the NCAs of Australia and New Zealand. Under this agreement, in merger cases that affect both countries, each NCA co-opts a commissioner (a member of the collegiate body) from the other NCA as a cooperating commissioner. That commissioner participates in all evidentiary activities and has access to the full case file. This cooperation is possible because of the proximity of the two countries, the similar problems they face, and their long tradition of cooperation and desire to create a common Trans-Tasman market.[21] The greatest challenge for the creation of joint investigation teams lies in the legal basis for such interagency cooperation, which throws up several specific issues, including in relation to enforcement of the decisions of joint investigation teams in cooperating jurisdictions and disclosure obligations, which may differ substantially depending on national law.[22]

It is also worth noting the existence of more general schemes for the admission of foreign officials. Indeed, some European NCAs – mainly the UK NCA, and to a lesser extent also the German NCA – have established secondment schemes.[23] The most developed programme is offered by the US administration (the Visiting International Enforcer Program of the United States).[24] Opportunities in this area are also offered by the OECD and UNCTAD, although in this case cooperation may concern the activities of the relevant international organisation rather than work on specific antitrust cases. The European Commission offers the greatest possibilities to host officials from member state NCAs. For example, one interesting practice of the Commission involves recruiting officials for short or medium-term contracts in situations where, due to the subject matter of the case, a person with a good knowledge of a particular language and the situation in a particular national market is needed within the team handling the case.

20 J. Fingelton, 'The Distribution and Attribution of Cases Among the Members of the Network. The Perspective of the Commission/NCAs', in C.-D. Ehlermann, I. Atanasiu (eds), *European Competition Law Annual 2002*, p. 336.

21 OECD, Executive Summary of the Hearing on Enhanced Enforcement Co-operation, p. 7.

22 J. Pecman, D.D. Pham, 'The Next Frontier of International Cooperation', p. 299.

23 An undoubted obstacle to the use of such programmes is the language barrier.

24 US Department of Justice, Division Update Spring 2017, https://www.justice.gov/atr/division-operations/division-update-spring-2017/international-program-update-2017 (accessed 4 February 2022).

As has been stressed many times before, the most solid basis for effective international cooperation is mutual understanding and trust between NCAs and the officials acting on their behalf. TCNs serve as forums for building these values. They can also be helpful in developing general rules on enhanced cooperation, including staff cooperation. It seems, however, that this cooperation primarily relies on the openness of national public authorities towards employing people of other nationalities. In this respect, for example, the Polish civil service – including the Polish NCA – seems rather closed.

8.4 Settlement of disputes concerning international cooperation between NCAs

International cooperation among NCAs can sometimes lead to disputes. These may arise, for example, due to disagreement regarding the scope of the additional conditions that undertakings must meet in order to obtain NCA approval for a planned concentration; or because of a failure to provide information or evidence, or to comply with a request for formal or informal legal assistance. One good example is the merger between General Electric and Honeywell.[25] The transaction was cleared by the US NCAs but blocked by the European Commission.[26] The most recent example concerned disparities in the assessment of the Cargotec/Konecranes merger, which was cleared by the European Commission but blocked by the UK NCA.[27] Interestingly, this issue is virtually absent from the official documents prepared by TCNs. While this is understandable from a European perspective, since Regulations 1/2003 and 139/2004 give the Commission the final say on many matters (with the possibility of potentially challenging its decisions before the European courts), it seems more surprising in the case of other networks. One explanation for this may be the voluntary nature of international cooperation and the lack of formal mechanisms to compel certain behaviour of NCAs within TCNs.

One exception to this was the 1995 OECD Recommendation,[28] which provided that in the event of disputes concerning international cooperation, the NCAs of OECD member countries could avail of a voluntary conciliation mechanism. The OECD's role was to organise a conciliation meeting at its headquarters, agree on the mediators and cater for the meeting. The meeting was chaired by the Chairman of the OECD Competition Committee, who also

25 M. Martyniszyn, 'Extraterritoriality in EU Competition Law', in N. Cunha Rodrigues (ed), *Extraterritoriality of EU Economic Law*, Heidelberg, Springer 2021, p. 20.

26 Case COMP/M.2220, *General Electric/Honeywell*, OJ L 48 [2001], pp. 1–85.

27 UK Competition and Markets Authority, CMA Blocks Planned Cargotec/Konecranes Merger, https://www.gov.uk/government/news/cma-blocks-planned-cargotec-konecranes-merger (accessed 31 March 2022).

28 Recommendation of the Council Concerning Cooperation between Member Countries on Anticompetitive Practices affecting International Trade, July 1995, https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0280 (accessed 31 January 2022).

determined the conciliation procedure. However, as clearly indicated in paragraph 12(d) of the Annex to the Recommendation containing the Guiding Principles on Notification, Exchange of Information, Cooperation in Investigations, Consultation and Conciliation on Anticompetitive Business Practices Affecting International Trade, the outcome of the conciliation procedure was non-binding on the NCAs involved and the procedure itself remained confidential.

There is no information available on whether the conciliation procedure has ever been used in practice (which may be explained by its confidentiality). However, it seems that this must have happened rarely, if at all, as the conciliation procedure was removed from the 2014 OECD Recommendation, which replaced the 1995 Recommendation. This may demonstrate that NCAs are reluctant to use even informal dispute resolution mechanisms, and that TCNs do not offer very far-reaching assistance in this regard. The OECD itself assumed that this was due to the effectiveness of basic methods of cooperation and consultation between NCAs, making it unnecessary to resort to a dispute resolution mechanism.[29] Another possible reason may be the voluntary and non-binding nature of such mechanisms, which is not conducive to NCAs investing their efforts and resources in them. Moreover, assuming no ill will on the part of individual NCAs, the source of the dispute may have been national rules that prevented NCAs from taking certain actions in the context of international cooperation, so the conciliation procedure would not have been helpful anyway. The unwillingness of states to refer jurisdictional disputes to international organisations, let alone to TCNs, must also be taken into account.[30]

It is worth mentioning that the new ICN Framework on Competition Agency Procedures (CAP) offers a non-binding and voluntary mechanism for discussions between NCAs. However, two reservations should be made in this regard. First, the mechanism is not designed to resolve jurisdictional disputes, but is intended more for discussions and reflection on the proper application of the CAP in a particular case. Second, the mechanism is not designed to address issues arising between NCAs, but offers the possibility for one NCA to approach its counterpart and invoke the CAP to remedy an action of the other NCA in proceedings regarding an undertaking from its jurisdiction. Under the CAP dispute mechanism, NCAs become advocates for procedural fairness against each other in favour of undertakings. Naturally, the mechanism is voluntary and non-binding, with the only sanction relating to the reputation of a particular NCA.

Given the ineffectiveness of the OECD conciliation mechanism, it is worth noting that there are generally no binding dispute resolution mechanisms under international competition law, let alone mechanisms for the imposition of sanctions. One result of the absence of an international treaty on competition law is

29 OECD, Competition Policy and International Trade. Instruments of Cooperation, Paris 1987, p. 26.

30 UNCTAD, Roles of Possible Dispute Mediation Mechanisms and Alternative Arrangements, Including Voluntary Peer Reviews, in Competition Law and Policy, 9 August 2004, pp. 16–17, http://unctad.org/en/Docs/c2clp37rev1_en.pdf (accessed 31 January 2022).

the lack of judicialisation of international competition law. In parallel, the judicialisation of international trade law has led to the emergence of quasi-judicial bodies to resolve disputes between states, which can impose real sanctions for violations of international trade law norms. This mechanism is particularly evident in the World Trade Organization.[31] However, no binding international legal norms of a universal nature have been developed in the area of competition law; together with the failure of even informal methods of conciliation within the OECD forum, this shows that jurisdictional disputes concerning competition matters may be resolved through bilateral agreements (which are instruments for the prevention of future disputes, rather than for the resolution of existing disputes) or informal contacts.

8.5 Mutual recognition of administrative acts and court decisions in competition matters

The mutual recognition of administrative acts remains more of a theoretical possibility than a practical reality. The development of international and transnational standards in this area is very limited, compared to the development of principles for the recognition of judgments in civil and even criminal matters. Thanks to European integration and the creation of the common market, mutual recognition of administrative decisions has been achieved in certain spheres – for example, in relation to professional and scientific qualifications, and the conformity of marketed products with standards. In addition, mutual recognition and the enforceability of administrative decisions are developing in relation to levies and charges, such as taxes and traffic fines. Nevertheless, there are still no universal rules on the recognition of foreign administrative decisions, even within the European Union. It should come as no surprise, therefore, that the issue of the mutual recognition of administrative decisions is not treated uniformly on theoretical grounds either.[32]

The introduction of rules on the recognition of foreign administrative decisions changes the traditional role of public administration bodies. Authorities cease to be exclusively an element of their national administration system and also become part of international administrative networks. The recognition of foreign administrative decisions requires the horizontal internationalisation of administrative relations, creating links between administrative cases heard by public administration bodies with similar jurisdiction.[33] The recognition of a foreign administrative decision implies the transfer of some public authority from

31 D. De Bièvre, A. Poletti, L. Thomann, 'To Enforce or Not to Enforce? Judicialization, Venue Shopping, and Global Regulatory Harmonization', *R&G*, vol. 8, iss. 3, 2014, p. 169.

32 A summary of the body of doctrine and national legislation on the issue of mutual recognition of administrative acts is presented by J. Rodríguez-Arana Muñoz (ed), *Recognition of Foreign Administrative Acts,* Heidelberg, Springer, 2016.

33 H. Wenander, 'Recognition of Foreign Administrative Decisions. Balancing International Cooperation, National Self-Determination, and Individual Rights', *Heidelberg Journal of International Law*, vol. 71, 2011, p. 785.

one state to another.[34] This is an example of the conflict between values of state sovereignty and international cooperation reflected by the principles of administrative authority and trust between states. It is emphasised that there is no obligation to recognise foreign administrative decisions in public international law. Moreover, according to the principle of sovereignty, there is no obligation to cooperate on administrative matters; and according to the principle of non-intervention, each country is obliged to refrain from interfering in the internal affairs of another country.[35] However, this formal approach does not take into account the development of international relations and the fact that countries may agree to give up some of their rights under the principle of sovereignty, as reflected in the institution of the recognition of foreign administrative decisions.

The principle of the mutual recognition of administrative decisions within the public administrations of EU countries serves two purposes: the horizontal opening up of countries as a result of European integration leading to a common market governance system based on competition between national administrations and national legal orders; and the resolution of conflicts between national regulations of different EU member states.[36] The mutual recognition of foreign administrative decisions is of particular importance in the European Union, as it results in the intersection of the European administrative legal order with national administrative legal orders. In the European Union, national legal orders interact with each other, which reflects the existence of a European administrative space. Within this space, in certain situations, states must accept the extraterritorial effects of national administrative decisions. The mutual recognition of administrative decisions, therefore, makes a community of law within the European Union a reality at the level of enforcing acts of law.[37]

A foreign administrative decision is recognised in the national legal order when it is given the effect of a final determination of an individual administrative matter. However simple this mechanism may seem, in practice it is quite the opposite. One of the basic problems with this mechanism is the very notion of an administrative act. For example, even in the Polish legal order, the definition of this term causes many problems; and this becomes even more complicated in an international context.[38] There is no uniformity of nomenclature and, significantly, no

34 M. Ruffert, 'Recognition of Foreign Legislative and Administrative Acts', in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law*, 2011, http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1087 (accessed 4 February 2022).

35 H. Wenander, 'Recognition of Foreign Administrative Decisions', p. 762.

36 L. De Lucia, 'From Mutual Recognition to EU Authorization. A Decline of Transnational Administrative Acts?', *Italian Journal of Public Law*, vol. 8, iss. 1, 2016, pp. 108–109.

37 B. Kowalczyk, E. Tomczak, 'Wzajemna uznawalność aktów administracyjnych', in R. Grzeszczak, A. Szczerba-Zawada (eds), *Prawo administracyjne Unii Europejskiej*, Warsaw, EuroPrawo Publishing Institute, 2016, pp. 115–116.

38 Z. Kmieciak, P. Florjanowicz-Błachut, R. Siuciński, 'Notion and Recognition of Foreign Administrative Acts in Poland', in J. Rodríguez-Arana Muñoz (ed), *Recognition of Foreign Administrative Acts,* pp. 243–244.

material convergence in treating the same actions as administrative acts.[39] Divergences concern subjective issues, such as who is regarded as a public administration body and, possibly, who, apart from bodies, can issue administrative decisions; as well as whether there are bodies that do not issue such decisions. Furthermore, doubts may arise as to the substantive and formal requirements that a given act should meet in order to be considered an administrative act. In addition, there are questions about the procedure for issuing an act; how parties' right to active participation (possibly the right of defence) can be ensured; and, possibly, additional requirements concerning the procedure for imposing administrative penalties. There is also the issue of judicial review of such decisions and its nature. Many administrative decisions may be more politically charged – for example, those issued under administrative discretion or based on the premise of overriding public interest, which are not easily transposed to another legal order. All these circumstances make the recognition of foreign administrative acts much more complicated than the recognition of foreign court judgments in civil or criminal matters.

In certain situations, the recognition of administrative decisions may have a broad meaning. These include cases in which an administrative decision in one country serves as evidence and the basis for an administrative decision in another country. However, it is difficult to make a clear distinction between formally recognising a foreign administrative decision and giving it evidentiary effect.[40] An additional problem is that NCAs often refer to decisions of other NCAs prosecuting the same international cartel.[41] In this situation, confusion as to the evidentiary value of a foreign antitrust decision and the subject matter of proof may be exacerbated.

In public international law, there are no general treaties or rules on the recognition of foreign administrative decisions. In some situations, countries have opted to conclude bilateral agreements in this area; although these tend to be rather specific, relating to a specific category of cases. The issue of the recognition of foreign acts, on the other hand, gained importance within the European Union when it became apparent that the existence of fully autonomous national systems for issuing decisions could constitute a significant barrier to the development of the common market. In particular, this concerns various types of administrative authorisations, such as decisions recognising certain professional or scientific qualifications or authorising the placement of certain goods or services on the market. The introduction of a mechanism for the mutual recognition of decisions by national administrations of EU member states removed the need to conduct numerous proceedings and has facilitated the cheaper and faster appearance of

39 J. Rodríguez-Arana Muñoz, J.J. Pernas Garcia, C.A. Cano, 'Foreign Administrative Acts. General Report', in J. Rodríguez-Arana Muñoz (ed), *Recognition of Foreign Administrative Acts*, p. 2.

40 H. Wenander, 'Recognition of Foreign Administrative Decisions', p. 760.

41 G. della Cananea, 'From the Recognition of Foreign Acts to Trans-National Administrative Procedures', in J. Rodríguez-Arana Muñoz (ed), *Recognition of Foreign Administrative Acts*, pp. 228–229.

goods and services on the common market.[42] Two systems of recognising foreign administrative decisions are in common use under EU law. The first is the system of strict recognition or outright recognition, whereby a foreign administrative decision becomes legally binding in the national legal order once a recognition decision is taken. The second is a single-licence system, whereby a foreign administrative decision has all the effects expressed in it without being recognised by a separate decision.[43] Some authors refer to such a decision as a 'transnational administrative act'.[44] The mutual recognition of decisions in many spheres of European regulation has been made possible by the functioning of European networks of authorities, which facilitates the smooth flow of information between national authorities and enables the prior verification of national standards, or the fact that a decision has been issued.[45] At the same time – paradoxically – there is a noticeable tendency to limit the scope of recognition of foreign administrative decisions in European law. On the one hand, this is done by centralising decision-making and transferring competences to EU institutions and agencies; while on the other hand, it involves restoring the full administrative jurisdiction of national administrations over certain categories of administrative acts. This state of affairs is a product of the financial crisis and the need to exercise greater control over the issue of administrative acts in the European legal area.[46]

Nonetheless, the mutual recognition of decisions in competition cases remains a more theoretical than practical concept. Significant problems relating to the absence of rules on the recognition of foreign decisions and barriers to the enforceability of such decisions issued against foreign undertakings were pointed out as far back as the early 1980s.[47] There are studies devoted to the possibility of using the mechanism for the recognition of foreign judgments of civil courts in cases that concern competition protection; but the conclusions of these studies have not translated into any practical attempts to enable the enforceability of a foreign antitrust judgment in any jurisdiction by this means.[48] They also demonstrated that Brussels I (ie, the EU Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters) provides no effective rules in this respect.[49]

42 J.J. Pernas García, 'The EU's Role in the Progress Towards the Recognition and Execution of Foreign Administrative Acts. The Principle of Mutual Recognition and the Transnational Nature of Certain Administrative Acts', in J. Rodríguez-Arana Muñoz (ed), *Recognition of Foreign Administrative Acts*, p. 17.

43 H. Wenander, Recognition of Foreign Administrative Decisions', p. 759.

44 L. De Lucia, 'Administrative Pluralism, Horizontal Cooperation and Transnational Administrative Acts', *REALaw*, vol. 5, iss. 2, 2012, pp. 17–18.

45 J.J. Pernas García, 'The EU's Role in the Progress', p. 18.

46 L. De Lucia, 'From Mutual Recognition', pp. 109 ff.

47 C. Canenbley, *Enforcing Antitrust*, pp. 67 ff.

48 J. Basedow, 'Recognition of Foreign Decisions within the European Competition Network', in J. Basedow, S. Francq, L. Idot (eds), *International Antitrust Litigation. Conflict of Law and Coordination*, Oxford, Hart, 2012, p. 398.

49 M. Danov, 'EU Competition Law Enforcement: Is Brussels I Suited to Dealing with All the Challenges?', *ICLQ*, vol. 61, iss. 1, 2012, pp. 52 ff.

Meanwhile, the mutual recognition of antitrust judgments is of considerable practical importance. First, the introduction of a procedure for the recognition of foreign antitrust judgments could significantly improve the fight against transnational cartels. It could also intensify the cooperation of NCAs in this area, while at the same time reducing their costs. In the case of transnational cartels, NCAs often assess the same or similar conduct of undertakings, rely on the same or similar evidence, and must follow the same evidentiary process and issue similar or identical decisions. There is no reason why the existence of a cartel, established through proceedings in one state, should not be introduced and recognised in a follow-on case in another jurisdiction by means of a judicial notice.[50] Second, the recognition of a foreign decision by an NCA may be the basis for its compulsory enforcement in a foreign jurisdiction. Currently, there is a significant challenge in enforcing antitrust liability against certain undertakings which may have all or most of their property – not to mention their registered office – in a jurisdiction other than that which issued the antitrust decision. This action may be aimed at avoiding liability, or may simply result from the specific business model and the opportunities offered by the globalised economy. Therefore, the absence of rules on the recognition of foreign antitrust decisions may result in a situation where an undertaking is held responsible for an antitrust infringement, but there is no legal possibility of enforcement against it. The recognition of foreign antitrust decisions is thus being discussed in greater depth, and there have even been initial attempts to implement the relevant regulations.

The mutual recognition of administrative acts and court rulings in competition matters can take two forms. In a moderate version, it could primarily involve giving evidentiary value to foreign decisions and judgments. Under this assumption, where the existence of a cartel was proved in one country, an NCA or a court in another country would be exempt from having to prove the same. This would be acceptable in relation to international cartels. In a more far-reaching version, the recognition of foreign judicial decisions and judgments could also provide a basis for their enforcement in the recognising country. While the OECD paper on enhanced cooperation[51] refers more to the moderate version, the ECN+ Directive assumes the more far-reaching effects of mutual recognition of acts and judgments.

The mutual recognition of administrative decisions and court rulings in a moderate version would result in a significant reduction in costs. It would allow NCAs to accept facts established in a foreign judgment as proven, and to rely on them in conducting their legal assessment. This would allow NCAs to rely on foreign judgments sanctioning international cartels, subject to the need to investigate and prove the 'national' aspect of the cartel's operation – for example, the identification of domestic cartel participants or counterparties, or the turnover of domestic cartelists.[52] It is noted, however, that in competition cases, it is often difficult to

50 M. Martyniszyn, 'Competitive Harm Crossing Borders', p. 702.
51 OECD, Executive Summary of the Hearing on Enhanced Enforcement Co-operation.
52 Ibid.

separate facts from their legal assessments, as proceedings are often conducted with a view to establishing certain facts, which in a way determines their subsequent legal assessment.[53]

A mechanism for recognising foreign decisions could increase the deterrent power of cartel rules, in particular against undertakings that infringe these rules on a transnational scale. It would allow for the quicker and more efficient sanctioning of anti-competitive cartel conduct that affects multiple jurisdictions simultaneously. In addition, this mechanism could particularly benefit smaller or younger jurisdictions, which often lack the strength and resources to pursue international cartels.

The OECD report lists situations in which NCAs have relied on the findings of other authorities in reaching their decisions. For example, the Brazilian NCA, in imposing a fine on the members of a vitamin cartel, relied on the findings set out in decisions of the European Commission and the US Department of State in equivalent cases.[54] Some NCAs also rely on the terms for the modification of a transaction negotiated in another jurisdiction when reviewing multi-jurisdictional concentrations.[55] Thus, for example, the international agreement concluded between Australia and New Zealand in 2010, known as the Trans-Tasman Antitrust Procedures Act, contains provisions on the mutual recognition and enforcement of judgments issued by the parties to the agreement.

The ECN+ Directive is another such solution. With regard to the imposition of administrative fines for breach of substantive competition rules (contained in the Treaty on the Functioning of the European Union (TFEU)) and procedural competition rules (Article 26 of the ECN+ Directive), the Directive assumes the mandatory and optional recognition and enforceability of such decisions.[56] The ECN+ Directive does not provide for the possibility of verifying the equivalence, from either a substantive or procedural perspective, of an antitrust decision of one EU NCA to which another ECN member has applied for the enforcement of a final antitrust decision. Article 26 of the Directive only sets out certain formal conditions that must be met in order to enforce a foreign antitrust decision. On the one hand, these relate to the unenforceability of the decision in the jurisdiction that issued it: having made reasonable efforts in its own jurisdiction, the applicant NCA must have ascertained that the undertaking or association of undertakings against which the fine or periodic penalty payment is enforceable does not have sufficient assets in its own jurisdiction to allow for recovery of the fine or periodic penalty. On the other hand, the decision must be final and there must be no ordinary remedy against it in the jurisdiction that issued it. The enforcement of a foreign antitrust decision must further accord with the national laws, regulations and administrative practices in force in the requested member state. The

53 J. Temple Lang, *Aims of Enhanced International Cooperation*, p. 13.

54 OECD, Executive Summary of the Hearing on Enhanced Enforcement Co-operation, p. 4.

55 Formally, however, it is difficult to speak in this case about the national authority being bound by the decision of the foreign authority.

56 Please note that merger control issues do not fall within the scope of this regulation.

enforcement of a foreign antitrust decision may be refused only if the requested NCA can demonstrate reasonable grounds showing that execution of the request would be manifestly contrary to public policy in the member state in which enforcement is sought; or that the formal requirements of the request (known as the uniform instrument) have not been fulfilled. This mechanism is not a novelty, as it is undisputable that national courts may always disregard foreign law or foreign administrative acts which would contravene the public policy of the forum in which they are to be executed.[57]

Significant practical problems may arise where a decision of a foreign NCA is recognised under domestic law on competition jurisdiction. The issue is whether the NCA – not to mention the ordinary courts – is bound by the decision and findings of a foreign NCA. This problem furthermore assumes importance in the context of enforcement of the decision of a foreign NCA. With respect to the first issue, in the absence of generally applicable regulations, it cannot be concluded that an NCA is bound by a decision of a foreign NCA recognised under domestic law. Such a decision cannot constitute a prejudicial decision because it was issued by another authority within its jurisdiction and formally concerns a different case. Moreover, it was issued on the basis of material gathered by the foreign NCA, which assessed it independently, according to the rules of its national law. Therefore, the home NCA will still have to collect and assess the evidence and then determine the legal consequences of these findings under both national and European law. Both Regulation 1/2003 and the ECN+ Directive allow for NCAs to adopt different decisions on the basis of the TFEU. NCAs are bound only by European Commission decisions, which do not require additional recognition in the national legal order. Similar principles apply to a court of law hearing legal remedies against a decision of an NCA. The court has full jurisdictional autonomy and its duty is to independently consider all the evidence, supplement it if necessary, and make its own legal classification. On the other hand, the decision of a foreign NCA may constitute evidence of the findings of that NCA and may be assessed in the context of all evidence gathered.

In view of the above, one may wonder whether a formal mechanism for the mutual recognition of competition decisions is necessary in every case in order for an NCA to be able to rely on the findings of a foreign NCA. Indeed, it would seem that this can even occur on a non-formalised basis, as long as NCAs have access to each other's decisions. According to the principle of the free assessment of evidence, an NCA or a court may assess the value of a foreign decision at its discretion and in view of the evidence gathered. Introducing a principle that would bind NCAs and courts to foreign competition rulings would take away their jurisdictional independence and force them to assess not only the rulings, but also the proceedings conducted before the foreign NCA from the perspective of fair procedure. Moreover, for criminal antitrust cases, this assessment would also have

57 F. Morgenstern, 'Recognition and Enforcement of Foreign Legislative, Administrative and Judicial Acts Which Are Contrary to International Law', *The International Law Quarterly*, vol. 4, iss. 3, 1951, pp. 344.

to encompass the requirements envisaged for such cases in the case law of the European Court of Human Rights.[58] One may therefore wonder whether NCAs really want to scrutinise each other's procedures and whether this would have a good effect on their cooperation.

Despite these reservations, there are calls in the literature for the introduction of a formalised mechanism for the recognition of foreign decisions.[59] However, this does not concern the possibility of their compulsory enforcement in a given jurisdiction, but rather the possibility of their recognition in order to give them a prejudicial character, and to enable a local NCA or court to rely on factual findings made in a foreign antitrust decision.[60] It is expected that the introduction of such a mechanism would increase the overall effectiveness of the fight against international cartels and assist smaller or newer NCAs in prosecuting cartels. It is proposed that the mechanism for recognising foreign antitrust settlements be based on five principles:

- The antitrust decision must have been issued in accordance with foreign law;
- The decision must contain clear and precise findings regarding the international cartel;
- The imposition of sanctions on an international cartel must be the primary object of the foreign decision;
- The entity issuing the decision to be recognised must meet the requirements of a judicial authority; and
- The addressee of the decision must have had the right to defend and challenge the foreign decision.[61]

This proposal, while interesting, does not eliminate the doubts raised earlier about the possibility of giving effect to foreign antitrust decisions. Moreover, while in the case of smaller jurisdictions this mechanism could significantly increase the effectiveness of NCAs, in the case of advanced national systems for the public enforcement of competition rules, this argument loses its sharpness.

The introduction of the principle of the mutual recognition and enforceability of antitrust decisions taken under European law raises the issue of the legal protection of the addressees of these decisions – both the legal basis of such protection and the form in which it is granted. The ECN+ Directive contains certain conflict of law rules that determine which law will apply to the effectiveness and enforceability of notifications and decisions. According to Article 28(1) of the Directive, the lawfulness of acts to be notified as enforced is governed by the law of the requesting member state; whereas:

58 J. Temple Lang, *Aims of Enhanced International Cooperation*, p. 13.
59 M. Marytniszyn, 'Competitive Harm Crossing Borders', pp. 702 ff.
60 M. Gal, *Increasing Deterrence of International Cartels through Reliance on Foreign Decisions*, DAF/COMP/WP3(2014)4, OECD, 24 June 2014, pp. 2–3, http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=daf/comp/wp3(2014)4&doclanguage=en (accessed 4 February 2022).
61 Ibid, pp. 4 ff.

> disputes concerning the enforcement measures taken in the Member State of the requested authority or concerning the validity of a notification made by the requested authority shall fall within the competence of the competent bodies of the Member State of the requested authority and shall be governed by the law of that Member State.

This means that the addressee of a foreign antitrust decision can only challenge it directly before foreign review bodies or courts. On the other hand, legal remedies provided for in the law of the executing state will be available to the addressee only with regard to execution proceedings. This type of situation may therefore pose a problem in relation to the enforcement rules to be applied. Foreign antitrust decisions may be both administrative decisions and court judgments. Therefore, both administrative and civil enforcement rules may come into play. The European legislature seems to leave this issue to NCAs, which, pursuant to Article 35 of Regulation 1/2003, designate the NCA as responsible for the application of Articles 101 and 102 TFEU. Importantly, member states may designate one or more administrative authorities and judicial authorities to carry out these functions. These issues must therefore be resolved on the basis of national rules implementing the ECN+ Directive.

These considerations illustrate the complexity of the recognition and enforceability of foreign administrative decisions. From this point of view, for European NCAs, the implementation of the ECN+ Directive will certainly be a challenge. It is currently difficult to predict how great the practical significance of these new provisions will be, or who will turn out to be the beneficiaries. The Directive's implementation will be an interesting test for the ECN and its members in terms of their willingness to cooperate and put aside national protectionism. Last but not least, it will be a good testing ground for the possible adoption of similar solutions of a universal nature.

8.6 Binding an NCA to a decision of a foreign or transnational competition authority

One issue relating to the problem discussed earlier is the actual or potential impact of a decision of a foreign or transnational competition authority on the jurisdiction of an NCA. Assuming that such decisions will affect the exercise of jurisdiction by the NCA, it is necessary to determine the nature of this impact and whether such decisions will be binding on the NCA. This issue can be illustrated on the basis of the Polish legislation.[62] It should be considered separately from merger control and anti-competitive practices, together with an indication of the distinctions arising from the application of European law.

First, national laws almost never grant foreign administrative decisions binding effect. For example, under Polish administrative law – including competition law – there is no regulation granting foreign administrative decisions or court judgments

62 Different national regulations cannot be excluded, although this would require extensive separate research in this area.

the weight of prejudicial effect. This means that a decision of a foreign NCA is not binding on the Polish NCA. However, exceptions to this solution can be found on European grounds. In the case of merger control, this problem is solved quite simply. If a merger has a Community dimension and the European Commission is competent to assess it, the Polish NCA loses jurisdiction to examine the case. Similarly, if the Polish NCA reviews a case with a domestic dimension, the Commission has no jurisdiction to review the case.[63] Importantly, Article 21(3) of Regulation 139/2004 stipulates that 'no Member State shall apply its national competition laws to mergers with a Community dimension'; but this does not preclude the assessment of mergers under other specific provisions that create such a possibility – for example, in relation to financial markets.[64] On the other hand, there are situations in which several foreign NCAs examine a merger simultaneously. Each examines the case autonomously and their decisions are independent of each other. The Polish NCA is not bound by foreign anti-monopoly decisions in merger cases and such decisions do not have legal effect in other legal orders.

Second, with regard to cases involving anti-competitive practices, the question of the impact of a foreign competition decision on the national legal order is more complex. It has been extensively considered[65] – in particular due to the adoption of the Damages Directive[66] and the national provisions that implement it.[67] In light of Article 9(1) of the Damages Directive and Article 30 of the Polish implementing law, only final decisions of the Polish NCA have the status of a prejudicial decision.[68] On the other hand, under Article 9(2) of the Damages Directive, decisions of foreign NCAs may have the value of *prima facie* evidence constituting a presumption of fact. However, even the Polish legislature did not go that far and equated decisions of foreign NCAs with other evidence, ordering that they be assessed as part of the overall body of evidence.[69] The

63 Please note that in the case of referrals, the initial jurisdiction of the authority (an NCA or the European Commission) changes.

64 For more on these possibilities, see S. Dudzik, *Współpraca Komisji Europejskiej z organami ochrony konkurencji w sprawach kontroli koncentracji przedsiębiorstw*, Warsaw, WK, 2010, pp. 129 ff.

65 For instance, R. Nazzini, 'The Effect of Decisions by Competition Authorities in the European Union', *Italian Antitrust Review*, vol. 2, iss. 2, 2015, pp. 68–97; E. Pärn-Lee, 'Effect of National Decisions on Actions for Competition Damages in the CEE Countries', *YARS*, vol. 10, iss. 15, 2017, pp. 177–196.

66 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain provisions governing the recovery of damages for infringement of the competition laws of the Member States and of the European Union, as covered by national law, OJ L 349, pp. 1–19.

67 Act on Claims for Damages Caused by an Infringement of Competition Law of 21 April 2017, JoL 2017, item 1132.

68 See more extensively J. Lenart, T. Kaczyńska, 'Związanie sądu ostatecznym rozstrzygnięciem Prezesa UOKiK, SOKiK lub Sądu Apelacyjnego oraz konsekwencje tego rozwiązania dla publicznego i prywatnego egzekwowania prawa konkurencji', *iKAR*, vol. 5, iss. 5, 2016, pp. 58–80.

69 M. Błachucki, R. Stankiewicz, 'Implementation of Damages Directive and the Prospects for Private Enforcement in Poland', *Global Competition Litigation Review*, vol. 2, iss. 11, 2018, pp. 53–54.

binding effect of competition decisions, on the other hand, applies to decisions issued by the European Commission on the basis of the TFEU. According to Article 16 of Regulation 1/2003, neither NCAs nor national courts, when ruling on agreements, decisions or practices under Article 101 or 102 TFEU which are already the subject of a European Commission decision, may take decisions that conflict with a decision adopted by the Commission. The courts must also avoid issuing decisions that conflict with a decision contemplated by the European Commission in the course of proceedings that the Commission has initiated. To this end, the national court may consider whether it is necessary to suspend the pending proceedings. Interestingly, there is no symmetry in the Commission being bound by decisions of ECN members taken on TFEU grounds. This is perfectly legitimate; although such decisions can contradict each other, as was evidenced by the decisions of ECN members in the cases relating to reservation platforms. Nevertheless, the Commission declared that unless a Community interest is at stake, it will not generally adopt a decision that conflicts with a decision of an NCA if the information requirement under Articles 11(3) and (4) of the Council Regulation has been complied with and the Commission has not applied the provisions of Article 11(6) of the Council Regulation.[70]

Apart from the indicated exceptions, decisions of foreign or transnational competition authorities will not be binding on the Polish NCA. Moreover, the Polish NCA cannot accept as proven the facts recognised as such in those decisions; it must instead establish the facts on its own. However, it is difficult to conclude that the Polish NCA should completely ignore the decisions of foreign or transnational competition authorities. As a member of many networks through which it cooperates with foreign and transnational competition authorities, the Polish NCA should take into account the decisions that these authorities have issued.[71] The lack of a formal procedural effect of these decisions (in most situations) does not negate their persuasive importance; and they can provide guidance on assessing the evidence and on the circumstances to take into account when conducting the analysis and making the final decision.

8.7 Judicial cooperation in competition matters

The enhanced cooperation of NCAs is complemented by the possibility to extend international cooperation to the courts.[72] This is because in some countries, it is the courts that adjudicate on competition cases, with the NCAs performing mainly investigative and prosecutorial functions. In the European Union, the role of the courts in competition cases has increased following the enactment of the Damages Directive and its implementation in national legal orders. In this situation, the extension of international cooperation to the courts would seem to be a natural

70 Point 3.2.57 Commission Notice on Cooperation within the Network of Competition Authorities, OJ C 101 [2004], pp. 43–53 ('ECN Notice').

71 M. Martyniszyn, 'Competitive Harm Crossing Borders', pp. 702–703.

72 Transnational judicial networks exist and are quite effective in some areas, such as family matters. For more details, see J.L Kreeger, 'The International Hague Judicial Network – A Progressing Work', *Family Law Quarterly*, vol. 48, iss. 2, 2014, pp. 221 ff.

way to further develop this cooperation. However, at present, the opportunities for this are very limited, due to the lack of additional legal instruments that would facilitate it.[73] There are also practical barriers to such cooperation – not least of which is the language barrier. The language barrier could be a challenge, as it was in Poland shortly after 1989.[74] At present, it seems that the only cooperation mechanism which is legally available is a request for mutual judicial assistance. However, this mechanism is highly formalised and takes a very long time, which in practice makes it useless for real and effective judicial cooperation in competition matters.

It is worth noting that a network of judges already exists: the Association of European Competition Law Judges (AECLJ).[75] This network, established in the form of a non-profit association under English law, was created to facilitate the exchange of experience and enhance the skills of judges in the context of the reform of European competition law and the enactment of Regulation 1/2003. The AECLJ is a form of judicial network. Although judicial networks cannot influence the jurisdiction of the courts, they still have an impact – direct or indirect – on the judicial function, as they expand the margins of judicial creativity, since the reference framework for national judges becomes more diversified.[76] This creativity lies at the heart of the interpretation of competition law. The AECLJ organises annual conferences under the auspices of the ECN, as well as training and courses. It also conducts research programmes and participates in public consultations on changes to European competition law.[77] Another long-term objective of the network, which has not yet been achieved, is the creation of a database of judgments of national courts applying European competition law. Importantly, the AECLJ is an information-only network and there is no indication that more advanced forms of cooperation are being undertaken. It seems that the main purpose of the AECLJ is to train and get to know judges under the auspices of the European Commission and the ECN, which support this organisation.

However, judicial cooperation in competition cases seems to be justified primarily in those legal systems where the courts not only have an appellate function, but also rule as an authority of first instance. An example is the US system, where the courts rely extensively on both informal and formal elements of cooperation,

73 A. Capobianco, A. Nagy, 'Developments in International Enforcement', p. 582.

74 M. Martyniszyn, M. Bernatt, 'Implementing a Competition Law System – Three Decades of Polish Experience', *JAE*, vol. 8, iss. 1, 2020, p. 40.

75 Association of European Competition Law Judges, http://www.aeclj.com/240/About-the-Association.html (accessed 4 February 2022).

76 M. Magrassi, 'Reconsidering the Principle of Separation of Powers: Judicial Networking and Institutional Balance in the Process of European Integration', *Contemporary Readings in Law and Social Justice*, vol. 3, iss. 2, 2012, p. 159, https://www.academia.edu/466932/Reconsidering_the_principle_of_separation_of_powers_judicial_networking_and_institutional_balance_in_the_process_of_European_integration (accessed 4 February 2022).

77 M. de Visser, M. Claes, 'Judicial Networks', in P. Larouche, P. Cserne (eds), *National Legal Systems and Globalization. New Role, Continuing Relevance*, The Hague, T.M.C. Asser Press, 2003, p. 352.

including in competition cases.[78] This also means that, from the point of view of European courts, such cooperation is not of primary importance. This is because it can be assumed that possible international cooperation has already occurred at the administrative stage involving the NCAs. In this situation, the courts dealing with legal remedies against NCA decisions will have rather limited scope to undertake such cooperation with an international dimension (although it cannot be excluded).

8.8 Cooperation between parliaments

Cooperation among parliaments on legislation in general, and on competition law in particular, seems to be more of a theoretical possibility than a practical reality. An interesting issue arises in the context of parliaments in the rapidly evolving transnational and international sphere. Continental integration and the increased competence of some international organisations have been taking place at the expense of national parliaments. There is a visible tendency to limit the rights of parliaments to regulate certain areas of economic and social life. Through international cooperation, parliaments may find a solution to the permanent loss of their participatory rights by engaging in direct relations with foreign parliamentarians and establishing new control bodies.[79] Much depends on the political system of a particular country and the factual significance of its parliament. If – as in Poland – parliaments are treated simply as a 'voting machine', with no distinct voice from government, it is difficult to expect that such cooperation will yield any results. However, there are also more mature republics with strong parliamentary traditions, in which parliaments still play a vital role.

In parallel to national parliaments, parliamentary political groups are also developing their cooperation. There are various examples of such groups that seek to promote networking among national parliaments. The most notable include:

- the Inter-parliamentary Union;[80]
- the Conference of Speakers of EU Parliaments;[81]
- the Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union;[82]

78 See more widely D.P. Wood, *Enhanced International Cooperation in Competition Cases. The Role of the Courts*, DAF/COMP/WP3(2014)5, OECD, 26 May 2014, http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=daf/comp/wp3(2014)5&doclanguage=en (accessed 4 February 2022).

79 H. Posdorf, International Parliamentary Cooperation, p. 3, https://www.kas.de/c/document_library/get_file?uuid=3fc1c188-3b2c-6b80-0aa1-4ca34f477455&groupId=252038 (accessed 4 February 2022).

80 Inter-parliamentary Union, About Us, https://www.ipu.org/about-us (accessed 4 February 2022).

81 EU Speakers' Conference, The Stockholm Guidelines for the Conference of Speakers of EU Parliaments, http://ipex.eu/IPEXL-WEB/dossier/files/download/082dbcc54b222e18014b505220e5365f.do (accessed 4 February 2022).

82 COSAC, http://www.cosac.eu/en/ (accessed 4 February 2022).

- the Interparliamentary EU Information Exchange;[83]
- the Parliamentary Assembly of Council of Europe;[84]
- the North Atlantic Treaty Organization Parliamentary Assembly;[85]
- the OECD Global Parliamentary Network;[86]
- the Parliamentary Assembly of the Mediterranean;[87]
- the Baltic Sea Parliamentary Conference;[88]
- the Parliamentary Assembly of the Black Sea Economic Cooperation;[89] and
- the Meetings of Presidents of Parliaments and Parliamentary Committees of the Visegrád Group.[90]

Those parliamentary assemblies are not full parliamentary bodies, but represent national parliaments through established international organisations. They seek to increase the transparency and accountability of such organisations. However, they seldom have any power in decision-making processes. Although national parliaments have been engaged in international cooperation, it is difficult to discern any visible results of such activities in developing competition policy and laws. The above-mentioned parliamentary assemblies tend to engage in political dialogue and are limited to more general issues. Competition law is usually regarded as a highly niche area with low political impact. Hence, networking of national parliaments on competition matters remains a theoretical idea rather than part of the existing practice.

8.9 Concluding remarks

The persistent legal limitations and differences in legal standards and regimes discussed in this chapter demonstrate that more far-reaching measures may be required to advance international enforcement cooperation, in particular to go beyond regional cooperation agreements.[91] Enhanced cooperation is motivated by

83 IPEX, Conferences, https://secure.ipex.eu/IPEXL-WEB/conferences (accessed 4 February 2022).
84 Parliamentary Assembly of CoE, https://pace.coe.int/en/ (accessed 4 February 2022).
85 NATO Parliamentary Assembly, https://www.nato-pa.int/ (accessed 4 February 2022).
86 OECD, OECD Global Parliamentary Network, https://www.oecd.org/parliamentarians/about/ (accessed 4 February 2022).
87 Parliamentary Assembly of the Mediterranean, https://www.pam.int/ (accessed 4 February 2022).
88 The Baltic Sea Parliamentary Conference, https://www.bspc.net/about-bspc/the-baltic-sea-parliamentary-conference/ (accessed 4 February 2022).
89 Parliamentary Assembly of the Black Sea Economic Cooperation, https://www.pabsec.org (accessed 4 February 2022).
90 Polish Centre for European Information and Documentation, Visegrád Group, https://oide.sejm.gov.pl/oide/en/index.php?option=com_content&view=article&id=14731&Itemid=754 (accessed 4 February 2022).
91 OECD, International Co-operation on Competition Investigations and Proceedings: Progress in Implementing the 2014 OECD Recommendation, 2022, p. 74, https://www.oecd.org/daf/competition/international-cooperation-on-competitioninvestigations-and-proceedings-progress-in-implementing-the-2014-recommendation.htm (accessed 13 June 2022).

a desire to avoid the duplication of actions and decisions, and to limit costs for business resulting from parallel proceedings and sometimes contradictory decisions of NCAs. It would also be beneficial to increase the overall detection and sanction of anti-competitive behaviour of undertakings across jurisdictions. There is a strong chance that such behaviours will not go unpunished, even if not all jurisdictions are capable of pursuing cartelists.[92] Allowing for enhanced forms of cooperation comes at the cost of limiting the administrative jurisdiction of NCAs, and consequently also the scope to exercise sovereignty – the basic emanation of which is administrative authority.

In this context, a dilemma arises as to whether the effective implementation of competition law rules is such an important value that others should be subordinate to it. Even on theoretical grounds, it is difficult to give a clear answer to this question. Moreover, it does not seem that an unequivocal answer applicable to all situations is possible. However, there is no doubt that this question should be considered by the legislature in the first place – at least by trying to specify situations in which priority should be given to one of the values under consideration. It is also impossible not to notice that the development of enhanced cooperation and the limitation of the exercise of sovereign jurisdictional rights by individual states lead to the emergence of vertical relations between members of networks and the application of sovereign instruments in their mutual relations, and consequently may constitute a driver to transform networks into hierarchical administrative structures with a transnational dimension.

Although this version of the further development of cooperation of NCAs may seem unlikely – at least at the current stage of development of international competition law – it cannot be excluded in the future. Therefore, some believe that the ICN may develop in the direction of promoting enhanced cooperation.[93] However, it is doubtful whether a network which has seldom previously engaged in administrative cooperation would suddenly begin to engage in enhanced cooperation. Moreover, the number and diversity of ICN members constitute important obstacles to the implementation of this scenario.

The development of rules on the recognition of foreign administrative decisions has prompted some authors to predict that the recognition procedure itself is becoming archaic in a situation where the issue of transnational administrative acts in the course of complex administrative procedures is increasingly common.[94] Although such conclusions are legitimate in some spheres of regulation, the example of competition law proves that the procedure for the recognition of foreign decisions is still relevant. It also seems difficult to expand the scope for issuing transnational administrative acts, especially in relation to national administrative decisions that impose administrative sanctions.

92 M. Martyniszyn, 'Competitive Harm Crossing Borders', pp. 702–703.
93 O. Budzinski, 'The Economics of International Competition Policy: New Challenges in the Light of Digitization?', in P. Lugard, D. Anderson (eds), *The ICN at Twenty*, p. 443.
94 G. della Cananea, 'From the Recognition', p. 241.

The strengthening of cooperation between NCAs, catalysed by TCNs, seems inevitable. This is because the premises that underpin the development of this cooperation are intensifying. This applies in particular to:

- the increasing globalisation of national markets and the development of the global economy;
- the proliferation of competition laws and the increased activity of NCAs in fighting international cartels;
- the emergence on the international antitrust scene of NCAs from two important jurisdictions – China and India; and
- the increase in multi-jurisdictional concentrations.[95]

Moreover, the rapid development of the digital economy has increased the risk of divergent outcomes of unilateral conduct cases in particular.[96] Due to all of these factors, the strengthening of cooperation between NCAs will continue. At this point, it is difficult to predict the directions and scope of these changes; but TCNs would appear to be the natural forums for agreeing the principles of this enhanced cooperation. Bilateral competition agreements, even between the largest jurisdictions, do not benefit from network effects, so their narrow scope of application in practice will result in low effectiveness in the long run. Enhanced cooperation will be further facilitated by the advanced development of regional forms of cooperation taking place within the European Union, which may inspire solutions on a broader scale.

Unlike the development of international cooperation among NCAs, such solutions are not accompanied by an increase in similar efforts at the level of courts or parliaments. Although there is hidden potential in encouraging these institutions to cooperate on competition matters, this is yet to be realised. However, should courts and parliamentarians show themselves willing to learn from each other, existing network structures could provide a very efficient mechanism for them to do so. International cooperation on competition through transnational networks of authorities, courts and parliaments would most likely move international trust to the next level of development. Although this currently remains a vision rather than a reality, there is a basis for the development of such global competition governance or at least for reflection on this possibility.

95 *Challenges of International Co-operation in Competition Law Enforcement*, Paris, OECD, 2014, pp. 51–52, https://www.oecd.org/daf/competition/Challenges-Competition-Internat-Coop-2014.pdf (accessed 4 February 2022).

96 J. Pecman, D.D. Pham, 'The Next Frontier of International Cooperation', p. 295.

9 Supervision of the international activities of national competition authorities within networks

The analysis of international cooperation between national competition authorities (NCAs) and the functioning of transnational competition networks (TCNs) inevitably leads to the problem of due process and the supervision of these bodies. Although TCNs are often informal, the cooperation of NCAs that takes place within them has implications for stakeholders and national governments. The more developed the international cooperation of NCAs, the more likely that it will affect the legal positions of participants to competition proceedings and other addressees of the actions of NCAs. Therefore, it is necessary to analyse how international cooperation between NCAs within TCNs may influence the rights of parties and other participants to competition proceedings. The interesting issue emerges as to where they can seek remedies and what remedies are available. Another issue concerns the general supervision of the international activities of NCAs within TCNs. This discussed using Poland as an example. Although each country has its own system of institutional arrangements, there are some general similarities between them. Hence, the example of one country may serve as a reference point for wider considerations.

9.1 The impact of international cooperation of NCAs on the rights of parties and other participants to proceedings

When discussing the international cooperation of NCAs, it is impossible to ignore the impact of that cooperation on the rights and obligations of the parties and other participants in proceedings before them. This chapter clearly separates those forms of cooperation of NCAs within TCNs that may directly affect the legal situations of third parties from those that do not. The issue of the impact of the operation of TCNs on the legal situation of third parties has arisen as network cooperation has deepened and administrative networks have emerged. As noted previously, in the case of information networks, cooperation does not involve the handling of individual cases, so it is difficult in this respect to consider that third parties' rights may be infringed. In this context, one of the most important charges against networks once again arises: the lack of accountability of their activities and those of the bodies that cooperate within their framework. Therefore, it is worth pointing out where the threats to the rights of third parties lie and how

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NCAs try to guarantee them an adequate level of protection. International cooperation between public administration bodies may sometimes entail a lower level of protection of the procedural rights of parties and participants in administrative proceedings than in the case of national administrative procedures, due to the transnational nature of such cooperation and the need to guarantee its effectiveness.[1]

The extent of interference with third-party rights will depend primarily on the formalisation and legal regulation of the TCN. In this respect, European administrative networks stand out. In the literature, the prevailing view is that European administrative networks, to the extent that they are regulated by European law, generally do not have a negative impact on the sphere of individual rights. This is because the general regulations of European law and national legislation guarantee the parties the right to active participation, judicial control, the rule of law and the transparency of authorities' actions.[2] However, when looking at the problem more broadly and including other types of transnational networks in the analysis, it is clear that the problems that may arise from the activities of TCNs, and that may affect the rights or obligations of third parties, relate primarily to harmonisation and administrative networks. General measures – often of a soft law nature – taken within harmonisation networks can lead to new procedural standards that may adversely affect the procedural position of parties. Similarly, administrative measures taken in the context of cooperation among NCAs within a TCN may affect the rights of parties – for example, the right to protection of privacy and other secrets protected by law, the right to access files or the right to an effective remedy.[3] This means that the potential impact on third parties' rights and obligations will depend on the type of action taken by the TCN's members.

Soft cooperation is not directly related to any ongoing proceedings and does not generally affect the rights or obligations of third parties. In many situations, such cooperation benefits not only the NCAs, but also third parties. This applies in particular to the organisation of open workshops, seminars and conferences. These meetings present an opportunity for knowledge to be shared and experiences exchanged. They also provide an opportunity to directly examine the practice of NCAs in other jurisdictions, which is why inviting third parties to participate is so important. Trust and mutual understanding should be built not only between NCAs themselves, but also between NCAs and their clients (ie, undertakings). The participation of NCAs and undertakings in joint open meetings establishes a good and, above all, non-confrontational forum for discussion. The lack of confrontation in this case results not from a lack of opposing views, but rather from a lack of disputes about the facts of given cases or their interpretation. Therefore,

1 G. della Cananea, *Due Process of Law Beyond the State. Requirements of Administrative Procedure*, Oxford, OUP, 2016, pp. 134–135.
2 F. Bignami, 'Transgovernmental Networks vs. Democracy. The Case of the European Information Privacy Network', *MJIL*, vol. 26, 2005, p. 810.
3 F. Bignami, 'Individual Rights and Transnational Networks', in S. Rose-Ackerman, P.L. Lindseth (eds), *Comparative Administrative Law*, Cheltenham, Edward Elgar Publishing, 2010, p. 634.

the basic principle of such meetings should be to exclude discussions of pending cases or the circumstances of cases that are not public knowledge. However, in large part, details of soft cooperation are not publicly available, due either to its nature or simply to the will of the NCAs concerned.

The creation of soft law acts within TCNs is also not directly linked to the legal situation of third parties. However, soft law may indirectly affect the legal situation of third parties by changing the administrative practice of NCAs and the way in which national or transnational rules are understood or applied. The answer to this problem may be the broader involvement of actors outside the sphere of public administration in the soft law process by TCNs. At the same time, a feature of soft law which results from its nature as a specific act of official interpretation of the law is that it binds only the authorities that have adopted it. This means, for example, that higher-level authorities – and above all, the courts – are in no way bound by soft law acts adopted by TCNs. In the course of appeal or court proceedings, the courts will assess the legality of administrative actions taken by administrative authorities and may challenge the correctness of their interpretations of legal provisions, regardless of whether such interpretations were directly authored by them or whether they drew inspiration from soft law enacted previously within the network.

Informal cooperation can take many forms. It does not always have to be linked to the parallel conduct of proceedings and the exchange of information used within them. The informality of such cooperation also means that administrative actions need not be undertaken within the framework of a specific investigation, but may be part of additional activities of the NCA. There is no doubt, however, that if an NCA intends to use information provided through informal cooperation, it should include it in the proceedings and document the source; and a party to the proceedings should have full access to it. This is so important because informal cooperation appears to be the primary mechanism used by NCAs. The process is quick, informal and easy to use – not only for the NCAs themselves, but also for those conducting the proceedings. However, such cooperation risks not respecting the rights of undertakings, as they will not necessarily know that it is taking place or be aware of its scope or intensity. Undertakings should be able to access the communicated positions of foreign NCAs on matters relevant to the cooperation and to present their positions accordingly.[4] However, this is only an indication of the doctrine and it may be questioned to what extent it is supported by national law. Therefore, all circumstances of procedural value established on the basis of information obtained through international cooperation should be open to the parties to the proceedings. It may be somewhat paradoxical, however, that within the framework of informal cooperation, undertakings may expect a higher level of protection in this respect. This is because, for example, Article 27(2) of Regulation 1/2003 provides that the right to access the file within the framework of cooperation between the European Commission and NCAs does not extend to correspondence between them. This issue highlights the problem of recording all

4 J. Temple Lang, *Aims of Enhanced International Cooperation*, p. 12.

procedural steps in the file, including those carried out within the framework of international cooperation. It seems that this does not always occur – even in the case of national proceedings, during which procedural guidelines on taking notes or making notes of all official actions are not always followed (which is often the case in Poland).

Formal cooperation should be characterised by the highest level of respect for the rights of parties and other procedural participants. In view of the far-reaching procedural consequences of formal cooperation, its existence is conditional on generally applicable legal norms entitling NCAs to enter into it. At the same time, these norms – which authorise the NCAs concerned to undertake one of the forms of formal cooperation – should specify legal remedies for entities whose rights or obligations may be affected by such cooperation. Unfortunately, however, this is not always the case. An interesting problem arising in the context of the cross-border exchange of tax information by tax administration bodies is the lack of legal protection for the entity to which the information relates. There is no obligation to inform the taxpayer about the transfer of its data to another country; and the taxpayer does not have access to information obtained from a foreign tax authority. This leads to the paradoxical situation that neither the tax authority which received the information nor the taxpayer can verify the veracity of the information provided.[5] A similar situation arises in the case of transfers of information under Regulation 1/2003 or Regulation 139/2004. The undertakings in relation to which the information has been transferred are not informed of this fact. If they are party to the proceedings before the NCA to which the information has been transmitted, they can at most ascertain this fact by accessing the file of the proceedings. Unfortunately, however, third parties whose data has been transferred by way of legal assistance under Article 22 of Regulation 1/2003 have no protection in this regard; they are not even informed of the transfer of their data. It seems that a legislative intervention is necessary to address this. Unfortunately, the ECN+ Directive was accompanied by other policy objectives of the European Commission, so the only option now is to introduce such guarantees through national legislation.

One way to protect the rights of undertakings is through restrictions on the use of evidence that is subject to disclosure or exchange. Such restrictions are imposed for several reasons. First, different countries have different regimes of liability for competition law violations. These can be administrative and sometimes criminal in nature. Second, the way in which evidence is obtained, and above all the procedural guarantees that accompany it, may differ. For example, under Polish law, the issues of freedom from self-incrimination and legal professional privilege are not generally regulated. This raises significant doubts as to the extent to which these institutions apply when the Polish NCA collects evidence. Third, the scope of competition law liability varies. In some countries, it applies only to legal entities;

5 K. Teszner, 'Standaryzacja współpracy administracji państw członkowskich Unii Europejskiej w dziedzinie opodatkowania', in Z. Czarnik, J. Posłuszny, L. Żukowski (eds), *Internacjonalizacja administracji publicznej*, Warsaw, WK, 2015, p. 208.

while in others, it also covers individuals. Although these limitations are to be welcomed, they are still too narrow and do not provide fully effective protection for data subjects.

Regardless of the form of cooperation, all NCAs have an absolute obligation to protect business secrets. The exemption from confidentiality is always limited in subject and object. Within the framework of formal cooperation, European laws that provide for the exchange of evidence always require the protection of business secrets (eg, Article 28(2) of Regulation 1/2003). Finally, every national competition system provides for the protection of business secrets, as this is a condition for business cooperation and for the effectiveness of the system. However, the protection of business secrets does not constitute grounds for refusing to exchange or make available information, as long as the generally applicable rules so provide (eg, Regulation 1/2003 or Regulation 139/2004). This means that although business secrets are protected, they cannot constitute grounds for refusing to provide legal assistance to a foreign NCA where such protection is provided for by generally applicable law.

The new ECN+ Directive also highlights the need to protect fundamental rights. However, this issue is dealt with in an extremely limited way. In the European Commission's original proposal, Article 3 of the Directive provided only that:

> the exercise of the powers referred to in this Directive by national competition authorities shall be subject to adequate safeguards, including as regards the respect of the rights of defence of undertakings and the right to an effective remedy before a tribunal, in accordance with the general principles of Union law and the Charter of Fundamental Rights of the European Union.

In line with the European Parliament's comments, this provision has been split into three paragraphs. The second paragraph adds the specification that the rights of defence consist of the right to be heard and the right to a remedy before a tribunal. The third paragraph introduces an obligation to deal with a case within a 'reasonable' time and to send a 'statement of objections' to the undertaking before a decision is taken. However, these provisions do not really create new procedural guarantees, but only elaborate on existing ones, which makes it difficult to conclude that the ECN+ Directive itself has introduced any normative novelty. In the case of Poland, one can only expect a transfer of the indicated information guarantees from the guidelines to the Polish Competition Act.

It is somewhat paradoxical to observe that the provision of an adequate level of legal protection depends primarily on national law. Since TCNs do not have legal personality and most of the activities undertaken within their framework by NCAs are of an informal nature, the basic legal protection is provided by national law (seldom by European law, where applicable). This is why it is so important that national legislatures afford an adequate level of legal protection to the parties to

competition proceedings. Unfortunately, however, this is not always the case, with Poland being a good example of this. Polish law still does not adequately recognise the Polish NCA's participation in international cooperation through TCNs, which may be considered a significant deficiency in Polish competition law. Similarly, the provisions of the Code of Administrative Procedure on European Administrative Cooperation are flawed, as they duplicate European regulations and fail to refer to the remaining sphere of international cooperation of Polish administrative bodies. Therefore, proper legislative intervention is needed in order to regulate the whole spectrum of NCA actions that fall within the scope of informal international cooperation. While the implementation of the ECN+ Directive may afford a possibility for legislative change, the initial signals from the Polish NCA are that the amendment under preparation has every chance of aggravating the existing problems and introducing new ones, without particularly improving the level of procedural guarantees for parties and third parties.

9.2 Forms of supervision of the international activities of NCAs within TCNs[6]

The processes of globalisation and Europeanisation have had a significant influence on NCAs. However, this impact is not uniform, which is especially evident in relation to the supervision of international activities undertaken by NCAs. As a starting point for the analysis, the Polish legal and administrative system is considered. While the Polish NCA may not be wholly representative of all European NCAs, the issues identified are universal in nature and may be relevant to other jurisdictions.

The supervision of the international activities of NCAs is an issue that touches on the very essence of cooperation among NCAs, and thus its transnational character. It is not the activities of NCAs themselves or the existence of TCNs that is problematic, but rather the transnational aspects of such activities. Due to this transnational element of the international activities of NCAs, such activities escape state supervision.[7] In this context, the possibility of effectively controlling TCNs at a global level seems particularly problematic. This issue may also raise concerns in the case of continental organisations. In the European Union, there are two basic problems: how to determine the jurisdiction of national and European courts when supervising European networks (which derives from the division of competences between NCAs and the European Commission and other EU institutions in the case of networks applying EU law); and the fundamental rights which apply to network activities.[8] These problems point to the fact that, at the EU level, there is a lack of adequate administrative mechanisms for controlling networks and the

6 This section is based on M. Błachucki, 'Supervision over the International Activities of National Competition Authorities (the Polish Experience)' in M. Błachucki (ed), *International Cooperation of Competition Authorities*, pp. 45–66, DOI: 10.5281/zenodo.5011922.

7 A. Hamann, H.R. Fabri, 'Transnational Networks and Constitutionalism', *IJCL*, vol. 6, iss. 3–4, 2008, p. 484.

8 F. Bignami, 'Individual Rights and Transnational Networks', p. 636.

NCAs operating within them (these are essentially limited to judicial review, plus the very limited role of the European Ombudsman). Complex administrative procedures in the European Union do not create a new administrative law order, but are rather a collective descriptive category. The result is that, within the multi-level European administration, there are no specific legal protection measures other than those offered by EU law or national laws.[9]

Taking all this into consideration, we examine possible supervisory mechanisms that could be used to review the international activities of the Polish NCA within TCNs. The analysis examines all existing and available supervisory mechanisms, with a focus on how they could be used to exercise control over the international activities of the Polish NCA. First, we analyse whether Polish law has adequate hierarchical administrative control mechanisms in this respect. The next level and forms of administrative control – that is, those exercised by the Polish Ombudsman, public prosecutors, specialised supervisory administrative authorities and the European Commission – are then analysed. This is followed by an overview of judicial (both national and European) control that may take place in this regard. In addition, parliamentary oversight is discussed. Last but not least, various forms of informal social control are considered.

9.2.1 Hierarchical administrative supervision of the international activities of the Polish NCA

The basic issue that emerges in the context of the hierarchical administrative supervision of the international activities of the Polish NCA is that this control is often illusory. Traditional public administration relations are hierarchical, whereby authorities with a social mandate exercise control over other official organs. This traditional image of relations has changed significantly due to the Europeanisation and globalisation of public administration. Influenced or obliged by European law, national legislatures have granted many public administration organs the status of independent authorities. This has placed a significant formal limitation on the possibility to exercise hierarchical administrative control over these independent authorities. At the same time, it means not only that these authorities have become largely independent of national governments, but also – paradoxically – that transnational bodies (EU institutions) have become the guarantors of this independence. This problem has been reinforced by two factors: the membership of national independent administrative authorities in transnational networks; and the transnational nature of many administrative matters requiring international cooperation between national administrative authorities. It is important to realise that, according to some researchers, almost every regulatory issue may now be considered to have an international dimension.[10] In the Polish context, it is not possible for the Ministry of Foreign Affairs to maintain a monopoly on contacts

9 G. della Cananea, 'The European Union's Mixed Administrative Proceedings', *LCP*, vol. 68, iss. 1, 2004, p. 215.

10 M.J. Warning, *Transnational Public Governance*, p. 23.

with foreign governments and national authorities of other states or international and transnational organisations. As a result, the Ministry of Foreign Affairs has effectively limited its functions to providing consular protection and maintaining diplomatic relations. Transnational cooperation in administrative matters has become the domain of ministries and other public administration authorities.[11] Currently, the role of the Ministry of Foreign Affairs in coordinating the international activities of Polish administrative organs is even more limited. The Ministry of Foreign Affairs still plays a leading role whenever binding norms are adopted in a European or international forum; or in the event of litigation before European or international tribunals and courts to which Poland is a party. Apart from these situations, however, the Polish NCA (like probably the vast majority of Polish public administration authorities) operates basically independently within the European administrative space. In addition, the Polish NCA operates completely independently of the Ministry of Foreign Affairs in many TCNs. Thus far, the Ministry of Foreign Affairs has never formally tried to influence the position of the Polish NCA presented through the forum of transnational networks. Moreover, in the course of researching this chapter, no information was found that the Ministry of Foreign Affairs had ever taken any action in connection with the Polish NCA helping to establish or acceding to any TCNs. Serious doubts may also be raised as to how closely the Ministry of Foreign Affairs actually supervises the Polish position on the proposed content of binding European law. One example is the negotiations on the ECN+ Directive, during which Poland's negotiating position was based almost entirely on the position of the Polish NCA. The Ministry of Foreign Affairs did not notice, for example, that the proposed guarantees of the independence of NCAs would conflict with decisions of the Polish parliament to limit the independence of the Polish NCA, and it in no way tried to influence the position of the European Commission in this respect.[12] This demonstrates the illusory nature of the Ministry of Foreign Affairs' control – not only in areas relating to administrative international cooperation of the Polish NCA, but also in areas where it should traditionally play a leading role.

The scope and influence of national hierarchical administrative control mechanisms are naturally restricted as a result of the internationalisation of public administration. The creation of transnational administrative networks (particularly in the European Union) has often led to legislative changes which have strengthened the national guarantees and procedures for independent national agencies. For example, the ECN may at times buffer the effects of formal domestic constraints. Moreover, the institutional settings of formal TCNs such as the ECN and the involvement of NCAs in activities within the network may constitute a significant barrier to ministers and national governments entering the administrative jurisdiction of NCAs.[13] This shows that by relying on standards of European law

11 Ibid.

12 In the last decade, the Polish parliament has twice directly deprived the Polish NCA of any formal guarantees of independence.

13 O.A. Danielsen, K. Yesilkagut, 'The Effects of European Regulatory Networks on the Bureaucratic Autonomy of National Regulatory Authorities', *Public Organization Review,* vol. 14, iss. 3, 2014, p. 368.

and enjoying the support of EU institutions, national public administration authorities can limit national mechanisms of control.

At the same time, the issue of hierarchical administrative control and the possibility of supervisory interference in the activities of a national public administration organ by another public administration authority (eg, a higher-level (appellate) authority) touch on the essence of international cooperation and the activities of TCNs. National administrative authorities can participate in these networks only if they enjoy jurisdictional independence. Cooperation at the transnational level is effective only if the cooperating authorities enjoy such independence.[14] A situation in which every administrative action requires the approval of another authority, or in which a participating NCA cannot make any arrangements with other NCAs without prior national consultation, significantly reduces the effectiveness of cooperation within the TCN. For this reason, a reasonable boundary and appropriate measures should be set out for hierarchical administrative control of the activities of NCAs within TCNs. At the same time, it is impossible not to notice that neither the Polish NCA nor any other Polish regulators have their own higher-level (appellate) authorities or ministries with which they are obliged to consult before presenting their position in international or network forums. Moreover, in the case of the Polish NCA, it would be difficult to find another Polish central authority with which it could consult in order to obtain substantive support on antitrust or merger matters. The Polish NCA has been structurally and organisationally independent from the outset, and was never part of any ministry.[15] The actual independence of the Polish NCA has thus been very broad from the start, due also to the specialised matters which it deals with. However, in many countries, NCAs were once part of ministries, and in these cases control mechanisms seem to be better developed. In Norway, for example, mechanisms for intra-administrative control exercised by the Ministry of the Economy in relation to the NCA previously included reporting obligations, the coordination of activities and a negotiation mandate. The basic instrument of control took the form of periodic reporting and the provision of other information by the NCA to the Ministry, which also covered the NCA's activities within TCNs. In this regard, the Ministry even issued a special instruction on when the provision of information was mandatory. In practice, however, the Ministry rarely specified the mandate that the Norwegian NCA should pursue in TCNs.[16] In addition, in cases where the issues discussed in a TCN went beyond the sphere of competition law, the Norwegian NCA sometimes sought the opinion of other Norwegian authorities. This nonetheless meant that the NCA still had a very high degree of independence in terms of its activities within TCNs.[17] Today, that direct ministerial oversight has been lifted, so the independence of the Norwegian NCA has increased further. This

14 B. Eberlein, 'Policy Coordination without Centralization?', p. 148.

15 In the last three years of the communist regime in Poland, the Ministry of Finance performed the function of the anti-monopoly authority. However, since the change in regime in 1989, the Polish NCA has always been a separate authority.

16 Those obligations were partially removed before 2014.

17 P. Lægreid, O.Ch. Stenby, 'Europeanization and Transnational Networks', p. 22.

shows that even in those countries which had developed mechanisms for hierarchical administrative control, these were not used due to the special perception of the role of the NCA.

An interesting paradox of TCNs is that they can be dominated by a technocratic approach to cooperation and the adjudication of cases. TCNs can thus behave like cartels. Participants join a cartel after calculating that the joint adoption of rules of conduct and coordinated behaviour would be more favourable than individual action. At the same time, each member of the cartel is motivated by the desire to maximise its profit in every situation and subordinates its behaviour to that motive. Simultaneously, the perceptions of such 'cartels' will depend on the perspective of the reviewer, which translates into an assessment of whether fighting the cartel is legitimate and justified. At a national level, interventions by politicians (national governments) can therefore be seen as an expression of sovereign control. On a transnational basis, on the other hand, the interventions of politicians (national governments) may be seen as egoistic actions aimed at the politically neutral activities of TCNs and, above all, at the other NCAs operating within them. As a result, at the transnational level, national politicians and governments are synonymous with egoism and particularism, with TCNs and the NCAs operating within them being treated as the highest good.[18] It seems also that in some situations, national public administration bodies – especially when they are endowed with broad independence – may approach relations with their national governments in the same way.

Studies of selected European NCAs have shown that their position has strengthened in relation to the ministries that supervise them as a result of the institutionalisation and formalisation of the European Competition Network (ECN).[19] There is no doubt that the participation of national authorities in transnational administrative networks strengthens the tendency to harmonise national laws – which is not, as a rule, questioned by national governments. There is a view in the literature that this does not necessarily mean that government control of independent authorities is weak; it can rather be a sign of mutual trust between national governments and national independent administrative bodies.[20] It seems that this thesis, which was formulated under the conditions of developed Scandinavian democracy, may not be easily transferred to some EU countries. For example, in Poland – a post-communist country with weakly grounded foundations of a republican state – the Scandinavian experience does not reflect the prevailing intra-administrative relations, which combine a large dose of systemic anarchy and traditionally understood manual hierarchical control.

One interesting form of control exercised by the Council of Ministers in relation to the Polish NCA concerns the government's competition policy and the obligation for the NCA to report on its implementation.[21] This could be an

18 M. Shapiro, 'Deliberative, Independent Technocracy v. Democratic Politics. Will the Globe Echo the E.U.?', *LCP*, vol. 68, iss. 3–4, 2004, p. 349.
19 O.A. Danielsen, K. Yesilkagut, 'The Effects of European Regulatory Networks', p. 367.
20 P. Lægreid, O.Ch. Stenby, 'Europeanization and Transnational Networks', p. 28.
21 Article 31 points 4 and 9 of Competition Act.

instrument for exercising long-term control of the implementation of specific public policies, including in the transnational sphere. However, this instrument is not suitable for ongoing or day-to-day control. Moreover, the practice of reporting on the implementation of government competition policies in Poland does not give grounds for optimism. An analysis of the reports shows that they contain a high level of generality and do not set out particularly ambitious tasks, with transnational and international issues playing only a marginal role.

Despite the lack of developed mechanisms for the hierarchical administrative supervision of the functioning of the Polish NCA in national and transnational forums, several instruments are nonetheless available within the system of Polish public administration. First, supervision is exercised by the Prime Minister,[22] who:

- appoints and dismisses the President and Vice Presidents of the Polish NCA;[23]
- approves the Statute of the Polish NCA, which specifies the organisation of the NCA and, by regulation, the local and substantive jurisdiction of its regional offices in matters relating to its activities;[24]
- executes the policy of the Council of Ministers and issues binding guidelines and instructions to the Polish NCA – although these cannot relate to cases concluded by administrative decision;[25]
- may conduct or commission an audit of the functioning of the Polish NCA on the basis of the Act on Control in Government Administration;[26]
- is competent to deal with complaints regarding the tasks or activities of the Polish NCA;[27] and
- is the head of the civil service corps.[28]

These possibilities for the Prime Minister to intervene in relation to the Polish NCA may suggest the existence of a strong hierarchical relationship. However, the practice of Polish public administration paints a different picture of these relations in reality. The Prime Minister oversees many central government administration authorities, as well as performing his many other tasks, which means that the ability to exercise ongoing control of the NCA is somewhat illusory. In addition, the appointment and organisational rights of the Prime Minister involve incidental rather than ongoing supervision.

22 Pursuant to Article 29(1) of the Competition Act, the Prime Minister exercises supervision over the activities of the Polish NCA.
23 Article 29 recitals 3 and 30 of the Competition Act.
24 Article 33 recitals 3 and 34 of the Competition Act.
25 Article 33c of the Act on Government Administration Divisions of 4 September 1997, JoL 2018, item 762.
26 Article 8 of the Act on Control in Government Administration of 15 July 2011, JoL 2011, no 185, item 1092.
27 Article 229(8) of the Administrative Procedure Code of 14 June 1960, JoL 2017, item 1257.
28 Article 153(2) of the Constitution of the Republic of Poland of 2 April 1997, JoL 1997, no 78, item 483.

The issuing of binding guidelines and instructions by the Prime Minister affords the greatest potential to influence the functioning of the Polish NCA. This instrument may be used to implement the policy of the Council of Ministers and concerns the general administrative policy of the NCA; but it cannot interfere with how the Polish NCA exercises its administrative (competition) jurisdiction. It is assumed that the guidelines are general and the instructions are specific, although in practice the distinction between the two may be problematic.[29] Guidelines are a traditional instrument of administrative management in public administration, which was particularly popular – and often abused – during the communist regime in Poland.[30] The guidelines and instructions issued to the NCA by the Prime Minister are binding and the Polish NCA is not entitled to appeal or review them. The guidelines and instructions may cover all matters falling within the government's scope of interest that also fall under the competence of the NCA. In practice, these instruments can be used to persuade the Polish NCA to take a closer look at a given sector or a specific type of suspected conduct. Such guidelines could also refer to involvement in international cooperation – for example, under regional or global initiatives of the Polish government. On the other hand, it should be considered as controversial – and even unacceptable – to specify in the guidelines the meaning of general clauses or other provisions included in the Competition Act, such as the rule of reason or public interest in merger control. Such supervisory interpretations would directly interfere with the exercise of the administrative (competition) jurisdiction of the Polish NCA and its power to determine individual cases, which would stand in stark contradiction to Article 33c of the Government Administration Divisions Act. The issuance of guidelines and instructions is a general system solution which is appropriate for a hierarchical public administration. However, the application of this instrument in relation to independent administrative authorities can raise serious concerns.[31]

This solution is in line with the current legal status of the Polish NCA. However, it is inconsistent with the ECN+ Directive and the obligation to restore the independence of the Polish NCA. The issuance of guidelines and instructions is contrary to the ECN+ Directive, which explicitly precludes the possibility of independent NCAs taking political instructions. This means that the strengthening of the ECN and its members will enhance the autonomy of NCAs in relation to national governments. This will also prove the observation that in practice, the participation of various Polish agencies in transnational networks weakens the importance of this supervision instrument of the Prime Minister in relation to the agencies that report to the Prime Minister.[32] One significant difficulty in the empirical verification of this observation is that the Prime Minister has never used

29 W. Góralczyk jr, *Kierownictwo w prawie administracyjnym*, Warsaw, WK, 2016, p. 115.

30 They are discussed in detail by W. Hoff, *Wytyczne w prawie administracyjnym*, Warsaw, PWN, 1987.

31 W. Hoff, *Prawny model organu regulacyjnego sektorowej*, Warsaw, Difin, 2008, pp. 194 ff.

32 J. Supernat, 'Koncepcja sieci organów administracji publicznej', in J. Zimmermann (ed), *Koncepcja systemu prawa administracyjnego. Zjazd Katedr Prawa Administracyjnego i Postępowania Administracyjnego*, Warsaw, WK, 2007, p. 215.

this supervisory instrument in relation to the Polish NCA. There are various potential explanations for this. The most optimistic is that the Prime Minister is keen to respect the independence and expert knowledge of the Polish NCA. Another is that the Prime Minister may not have used this instrument due to a lack of need or lack of practice. The most pessimistic potential reason is that there is no need to issue formal guidelines and instructions since these are issued informally. However, an assessment of these reasons and their veracity would go beyond the scope of this book.

The Act on Control in Government Administration also creates broad possibilities for the Prime Minister to control the functioning of the Polish NCA. According to Article 6(1) of this Act, the Prime Minister controls government administration organs or units, as well as units that are subordinate to or supervised by them. The Polish NCA is one such body. The Prime Minister may order an individual audit of the NCA, but may also order an audit of the entire area of government administration (Article 8(2) of the Act on Control in Government Administration). In such case the Prime Minister will define the scope and object of the audit, as well as its methodology. The auditors have the right to access documents and obtain witness testimony (Article 22). After the audit, a report is prepared and, if necessary, recommendations and post-audit conclusions are formulated. There is no publicly available information as to whether the Prime Minister has ever ordered an individual audit of the Polish NCA. The Polish NCA has been covered by several sectoral audits (covering all central public administration authorities); but once again, there is no publicly available data on whether any post-audit conclusions were formulated regarding the Polish NCA, or on whether and how the NCA implemented them. Furthermore, there is no data on whether such an audit has ever involved the international cooperation of the NCA, including its involvement in TCNs. The lack of such data in the public domain may indicate that the Prime Minister's control over the functioning of the Polish NCA under the Act on Control in Government Administration has thus far been quite limited. There is also no indication that this practice will change in the near future.

The Prime Minister's supervision of the civil service corps, including officials in the Polish NCA, is also rather general. In practice, this instrument of control has been used somewhat exceptionally, and it has not been utilised in recent years in relation to any NCA officials. A potentially wide scope of control may result from the consideration of complaints and motions that individuals may lodge with the Prime Minister if they are dissatisfied with the functioning of a particular public administration authority, or the behaviour of a civil servant. However, this system is highly inefficient. There is no publicly available information about any formal activities initiated by the Prime Minister in relation to employees of the Polish NCA; nor is there any information about complaints lodged with the Prime Minister concerning the international activities of the Polish NCA.

The Ministry of Finance exercises specific financial control over the NCA. The Polish NCA has no budgetary independence: the budget is proposed by the Ministry of Finance and adopted by parliament. The Ministry of Finance also controls the observance of budgetary discipline by the NCA. However, there is no

publicly available information as to whether and to what extent the Ministry actually exerts any pressure on or influences the NCA by using the budget as leverage. Certainly, the Ministry of Finance is not particularly sensitive to requests to increase the budget of the Polish NCA – even where its scope of responsibility has significantly increased. One example is the Act on Combating the Unfair Use of a Contractual Advantage in Trade in Agricultural and Food Products,[33] which imposed broad new obligations on the Polish NCA. In the first accompanying memorandum to the draft of this act, several dozen new positions were envisaged for the Polish NCA in order to implement and apply the new legislation. In the end, no new posts were created, but vast numbers of new tasks were attributed to the Polish NCA. Therefore, although the budget could potentially be an important mechanism of administrative control, the practice of the Polish NCA does not bear this out. Although the international activities of the NCA may constitute a budgetary burden, there is no publicly available information on any significant restrictions or budgetary charges being formulated regarding the activities of the Polish NCA in the international sphere.

An analysis of the mechanisms of hierarchical administrative control regarding the international activities of the Polish NCA reveals that national administrative law only allows for such supervision by certain authorities (the Prime Minister or the Ministry of Finance within the scope of their competence). The existing supervisory mechanisms are not used at all, or are used only selectively (mainly limited to nominating and dismissing the President of the NCA, and approving its Statute and regional organisation). This may be due to many factors, including the low political visibility of the international activities of the Polish NCA; the lack of importance attributed in current policy to certain areas of regulation, including competition; the lack of substantive preparation of individuals to carry out inspections; and the existence of informal relations between the supervisory and supervised bodies. However, there is no publicly available data or separate analysis in this regard. Therefore, the (non-)application of formal supervisory mechanisms undoubtedly requires further research.

9.2.2 Supervision exercised by the Ombudsman and the Public Prosecutor

In Poland, the Ombudsman and the Public Prosecutor's Office control the functioning of public administration, but their supervision of the international activities of the Polish NCA appears to be limited. The Prosecutor's control of administration concerns two main forms of administration: administrative decisions and general normative acts adopted by the public administration.[34] This means that the Prosecutor's control primarily concerns formalised administrative actions. In particular, pursuant to Article 182 of the Administrative Procedure Code, the Prosecutor may participate in administrative proceedings as an entity with the rights of

33 Act on Counteracting Unfair Use of Contractual Advantage in Agricultural and Food Products of 15 December 2016, JoL 2017, item 67.

34 A. Habuda, *Granice uznania administracyjnego*, Opole, Politechnika Opolska, 2004, p. 187.

a party. However, with regard to control over the international activities of national authorities in the transnational sphere, it is difficult to find special legal grounds for intervention by the Prosecutor's Office. Moreover, the legal grounds for direct intervention by the Prosecutor's Office in the activities of TCNs are even shakier.

Similarly, the role of the Ombudsman in controlling the international activities of national public administration bodies appears to be very limited. In accordance with Article 14(6) of the Act on the Ombudsman of 15 July 1987,[35] the Ombudsman may request the initiation of administrative proceedings, lodge complaints with an administrative court, and participate in these proceedings with the rights of a Prosecutor. The premise for the Ombudsman's intervention is a violation of civil rights and freedoms. As a result, the scope of the Ombudsman's potential control covers selected formalised administrative actions of national authorities undertaken in the course of administrative proceedings. Therefore, it is difficult to consider the Ombudsman as a body that could effectively undertake control activities in relation to the activities of administrative authorities (including the Polish NCA) in the transnational sphere. Similarly, the role of the Ombudsman in controlling the operation of TCNs is more than limited.

9.2.3 Supervision exercised by special independent public authorities

National public administration bodies also come under the control of state control authorities. The most important is the control exercised by the Supreme Audit Authority. Pursuant to the Act on the Supreme Audit Authority of 23 December 1994,[36] the Supreme Audit Authority is the supreme authority of state control and supervises, among other things, activities of public administration. In particular, it examines the implementation of the state budget and the implementation of laws and other legal acts in relation to the financial, economic and organisational-administrative activities of these authorities, including the implementation of internal audit tasks. The audit criteria of the Supreme Audit Authority are very broad and include legality, economy, and efficiency. The Supreme Audit Authority may control public administration bodies on its own initiative or at the request of the Parliament, the President or the government. It is an independent authority that reports directly to Parliament. The system and jurisdiction of the Supreme Audit Office are derived from the Russian model and are much broader than those of the audit offices in many European countries. The Supreme Audit Authority is positioned to play an important role in verifying the functioning of public administration bodies, including potentially their international activities. However, the information available on the Supreme Audit Authority's website and in its annual reports contains nothing to suggest that it has ever audited any national authority in this respect.[37]

35 Act on the Ombudsman of 15 July 1987, JoL 2017, item 958.
36 Act on the Supreme Audit Authority of 23 December 1994, JoL 2017, item 524.
37 Such an audit took place in 2020, in relation to how the Polish NCA conducted its administrative proceedings in competition cases. No information on the outcome of this audit is currently available.

Moreover, the effects of a Supreme Audit Authority audit are quite limited, especially with regard to the functioning of independent public administration bodies. The main impact of the Supreme Audit Authority's audit comes from the audit findings and possible notification of the relevant authorities of any violations of law. When it comes to auditing the activities of national agencies in the transnational sphere, it is difficult to find a special legal basis for intervention by the Supreme Audit Authority. As noted previously, this sphere of functioning of administrative bodies is regulated by law in a limited way; there are usually no legally defined goals for this activity, which makes it difficult to establish appropriate control criteria in this respect. In addition, since the basic form of international activity of the Polish NCA involves soft cooperation and the adoption of soft law, it is difficult to imagine how the Supreme Audit Authority's auditors would undertake an audit, because it is unclear what would be the purpose of such an audit and what control criteria they would apply.

9.2.4 Supervision exercised by the European Commission

It is also worth mentioning the administrative control exercised by the European Commission in relation to European competition networks. An analysis of Regulations 1/2003 and 139/2004 shows that the possibility for the European Commission to exercise administrative control over NCAs is practically excluded. The Commission may, in limited situations, intervene in ongoing cases. However, the Commission cannot intervene where an NCA does not voluntarily take administrative action – for example, where it fails to initiate proceedings, despite being obliged to do so by European regulations. In a system where proceedings are instituted only *ex officio* (as in antitrust cases), it is actually the NCA that decides on the initiation of proceedings. Interestingly, this applies equally to national and EU law. While the European Commission may take over the case, express an opinion and influence the content of the decision, there are no legal instruments that prevent an NCA's inaction and non-application of European law by not instituting antitrust proceedings.[38]

The information exchange and case allocation mechanisms provided for under the ECN and Regulation 139/2004 in merger cases set out the powers of the Commission. However, these powers are not of a controlling nature, but result from the effectiveness of the proceedings conducted by the Commission and a desire to ensure the uniformity of competition decisions based on Treaty provisions. This means that the Commission cannot be treated as a higher-level (appellate) authority or a supreme authority within the meaning of the Administrative Procedure Code, or a state control authority in relation to the Polish NCA. The Commission itself is generally not subject to administrative control,[39] but is

38 G. Tesauro, 'The Relationship between National Competition Authorities and Their Respective Governments in the Context of the Modernisation Initiative', in C.-D. Ehlermann, I. Atanasiu (eds), *European Competition Law Annual 2002,* p. 272.

39 Some form of administrative control, in relation to financial matters, is exercised by the European Anti-Fraud Office, however.

subject to extensive judicial review in the area of administrative jurisdiction, where the rules on the exercise of that jurisdiction have largely been shaped by the case law of European courts. The European Commission is the body before which decisions of EU agencies are appealed,[40] but NCAs have a completely different status from EU agencies. The Commission undertakes many of the activities controlled by European courts as a member of European competition networks and is also subject to judicial jurisdiction in this regard.[41]

9.2.5 Judicial control of the transnational activities of NCAs

Judicial control of the activities of NCAs may be initiated where actions that they have undertaken affect the legal situation of third parties. As a result, judicial review does not, by its nature, cover most forms of international cooperation. For this reason, the activities of TCNs themselves are not covered by judicial review, as no competition network has administrative jurisdiction or can take administrative actions or decisions affecting the legal situation of third parties. At the same time, binding acts of national, transnational and international law determine autonomously which acts and administrative decisions of public administration bodies are subject to the jurisdiction of a given court. There are noticeable differences in the jurisdictions of national courts in competition cases, which means that the addressees of administrative actions undertaken by ECN members must take into account the different level and intensity of judicial review exercised in a given national jurisdiction.[42]

A certain paradox is evident, as although the international activities of NCAs and TCNs take place within a transnational space, the administrative activities of NCAs are undertaken within the framework of the national orders. In this respect, the role and significance of transnational courts – not to mention international courts – are very limited. Obviously, if a transnational authority such as the European Commission takes administrative action, the court that is competent to assess its activities will be the European court. Decisions of NCAs, even if preceded by international cooperation, are subject to the jurisdiction of the national courts. In addition, it is clear from the case law of the European courts that if the Commission carries out dawn raids on national undertakings in accordance with Article 20 of Regulation 1/2003, it must ask the national court for authorisation should national law so require. However, the national court has no competence to

40 An overview of the Commission's activities as an appellate body is presented by P. Chirulli, L. De Lucia, *Non-Judicial Remedies and EU Administration. Protection of Rights versus Preservation of Autonomy*, London, Routledge, 2021, pp. 72 ff.

41 R.J.G.M. Widdershoven, P. Craig, 'Pertinent Issues of Judicial Accountability in EU Shared Enforcement', in M. Scholten, M. Luchtman (eds), *Law Enforcement by EU Authorities. Implications for Political and Judicial Accountability*, Cheltenham, Edward Elgar Publishing, 2017, pp. 334 ff.

42 K.J. Cseres, A. Outhuijse, 'Parallel Enforcement and Accountability. The Case of EU Competition Law', in M. Scholten, M. Luchtman (eds), *Law Enforcement by EU Authorities,* p. 113.

assess the legality of the inspection itself; it only verifies that the limits for the use of coercive measures have not been exceeded.[43] Decisions of NCAs with transnational effects can sometimes raise jurisdictional problems because the involvement of NCAs from different jurisdictions (resulting from the transnational nature of administrative action) translates into a multiplicity of potentially competent courts to hear challenges to such actions.[44] However, in most cases no such problems arise. The jurisdiction of the court is determined by the jurisdiction of the NCA. Therefore, even if the Polish NCA issues decisions on the basis of European law, the Polish court will still be competent to hear legal measures against this administrative decision. In addition, a reference in any decision of the Polish NCA to the guidelines adopted by a transnational network will not affect the jurisdiction of the courts. In this context, it is also worth noting that transnational soft law norms adopted within TCNs are not binding on national courts.[45] It is an undisputed rule that soft law acts, whether national or transnational, can never be the basis for any administrative acts issued by any NCA.

The competent courts for reviewing the activities of the Polish NCA are the civil courts (ie, the Court for Competition and Consumer Protection, the Court of Appeal in Warsaw and the Supreme Court) and the administrative courts. Jurisdiction in matters relating to the supervision of the activities of the Polish NCA undertaken in competition proceedings is based on the jurisdictional dualism of those courts. The legislature assigns fundamental significance to civil courts and the Supreme Court, entrusting them with the adjudication of legal actions (appeals) against administrative acts taken by the Polish NCA. The role of the administrative courts seems to be smaller; although in the case of international cooperation, the Polish NCA may be visible in some situations.

9.2.6 Jurisdiction of national courts in relation to the supervision of the international activities of the Polish NCA

When analysing the jurisdiction of the Polish courts[46] and referring to the activities of TCNs and other forms of international cooperation of the Polish NCA, judicial jurisdiction is limited to the supervision of formal official activities – in particular administrative acts, as well as the inaction or delayed conduct of the Polish NCA. As the civil courts have full jurisdiction in competition cases, they

43 Case C-94/00, *Roquette Frères SA v. Directeur général de la concurrence, de la consommation et de la répression des frauds* of 22 October 2002, ECLI:EU:C:2002:603.

44 A.H. Türk, 'Judicial Review of Integrated Administration in the EU', in H.C.H. Hofmann, A.H. Türk (eds), *Legal Challenges in EU Administrative Law*, Cheltenham, Edward Elgar Publishing, 2009, p. 218.

45 S. Lavrijssen, L. Hancher, 'Networks of Regulatory Agencies in Europe', in P. Larouche, P. Cserne (eds), *National Legal Systems and Globalization,* p. 208.

46 For a detailed analysis of jurisdiction of civil and administrative courts in competition cases, please refer to M. Błachucki, 'Rola i właściwość sądów powszechnych i administracyjnych w sprawach antymonopolowych w świetle najnowszego orzecznictwa i zmian normatywnych', *Studia Prawnicze*, iss. 3, 2017, pp. 115 ff, DOI: 10.37232/sp.2017.3.5.

may assess the full course of administrative proceedings and the impact of the individual actions of the NCA on the resolution of a case. This also applies to the supervision of formal administrative activities undertaken as part of international cooperation between the Polish NCA and its foreign counterparts. In principle, if they are non-jurisdictional (ie, they do not affect the legal position of third parties), actions undertaken in an informal way, under soft cooperation, remain outside the jurisdiction of the Polish administrative court, let alone the civil courts.

This means that the Polish courts have no legal grounds for a comprehensive audit of the activities of international cooperation of the Polish NCA; but they may scrutinise certain activities undertaken by the NCA, as long as these relate to a pending administrative (competition) case. On the one hand, this should not come as a surprise. Soft cooperation between NCAs does not affect any third-party rights or obligations, so there is no room for court intervention in this respect. A more complex issue is the ability to supervise soft law acts adopted by TCNs. In this respect, the situation does not differ from the judicial supervision of soft law acts undertaken by the Polish NCA. This means that the Polish courts cannot directly check the legality of these acts or the views expressed in them; but at the same time, by seeing how the legal norm is applied in a particular case, they can present another interpretation of it, which is potentially contrary to the interpretation expressed in a given soft law act.[47] One possible difficulty with regard to administrative activities undertaken within the framework of soft cooperation between NCAs is the absence of any record of such cooperation in the case file. In terms of recording activities undertaken in the course of administrative proceedings, the provisions of the Administrative Procedure Code are very vague, leaving a very wide margin of interpretation to the Polish NCA. At the same time, there are almost no public announcements by the Polish NCA admitting that cooperation has taken place in a particular case.

9.2.7 Jurisdiction of transnational and international courts in relation to supervising the international activities of the Polish NCA

The role of transnational and international courts in supervising the activities of TCNs and other forms of international cooperation of NCAs seems even more limited than that of national courts. In general, courts exercise jurisdiction over entities that come from their jurisdiction. This means that the European courts are competent to review the administrative activities of the European Commission and other European institutions. The standard judicial control of the Polish NCA is exercised by national courts. European courts do not have jurisdiction in this respect. In principle, European courts may review the compliance of Polish provisions with European ones – for example, as a result of a question submitted by a Polish court for a preliminary ruling. Alternatively, indirectly, while reviewing administrative activities undertaken in cooperation with the Polish NCA, the European court may also find that European law norms have been violated if such administrative activity was carried out incorrectly.

47 M. Błachucki, 'Judicial Control of Guidelines', pp. 53 ff.

The European Court of Human Rights (ECtHR) may also play a role. However, the ECtHR will exercise its jurisdiction should a case involve the imposition of a sanction that, in light of Article 6 of the European Convention on Human Rights, may be considered as a criminal sanction. This means that an ECtHR audit of individual administrative activities undertaken within the framework of international cooperation of NCAs has very limited chances of occurring, is dependent on the imposition of sanctions, and can be implemented only after the jurisdiction of the domestic court has been exhausted.

At the end of this section of the chapter, it is worth pointing out the possibility of affording judicial protection to the addressees of the activities of NCAs undertaken as part of international cooperation by specialised international bodies of a judicial nature. In this regard, the Appellate Body of the World Trade Organization (WTO) must be mentioned as an example, as it performs this function within the framework of the WTO.[48] This institution is quite effective in increasing the WTO's accountability and affording judicial protection to the addressees of WTO activities. However, the position of this body is unique in the international sphere. One should bear in mind that one of the reasons for the failure of talks on an international competition treaty under the aegis of the WTO was the deep reluctance of many countries to submit disputes arising under this treaty to the binding case law of the WTO Appellate Body.[49] This shows that, although specialised international tribunals can be an effective mechanism for judicial protection in the case of the activities of TCNs, they are extremely rare in the practice of international relations and their significance is limited to selected areas of transnational sectoral regulation.

9.2.8 Parliamentary control in relation to the supervision of the international activities of the Polish NCA

The next issue to discuss is whether and to what extent parliamentary control can be exercised over the international activities of the Polish NCA. The issue of parliamentary control over the activities of public administration bodies in Poland has been heavily neglected. Parliamentary control is the very essence of parliamentarism. It seems that the lack of Polish legal doctrine in this area results from the inertia of the Polish parliament itself. In developed republican systems, which recognise the importance of the representative of the *demos*, the role of this branch of power may be much more significant. Foreign examples, such as the United States and even the European Union, are convincing in this regard. As a result of the development of the European composite administration, the number of independent specialised national authorities has increased. These authorities are largely immunised against administrative (governmental) control mechanisms. Interestingly, there is no doubt that

48 T. Zwart, 'Would International Courts Be Able to Fill the Accountability Gap at the Global Level?', in G. Anthony, J.-B. Auby, J. Morison, T. Zwart (eds), *Values in Global Administrative Law*, p. 213.

49 M.H. Dabbah, *International and Comparative Competition Law*, pp. 129–130.

subjecting the activities of independent administration authorities to parliamentary control would not violate their independence; indeed, this is considered a normal mechanism of control in developed republican states. It is therefore worth considering how the system of parliamentary control in Poland looks in relation to public administration.

The lower chamber of the Polish parliament (*Sejm*)[50] controls public administration. The role of the Senate (the higher chamber) in exercising a control function is limited, although there are voices in the literature that suggest this should be expanded.[51] Parliamentary control can be exercised directly by the *Sejm*, parliamentary committees or the deputies themselves. Traditionally, parliamentary control includes the right to information, the right to be present, and the right to be heard.[52] In addition, the *Sejm* plays an important creative role. According to Article 95(2) of the Polish Constitution, the *Sejm* exercises control over the activities of the Council of Ministers within the scope specified in the Constitution and in statutes. This provision indicates that the control function of the *Sejm* is implemented primarily in relation to the Council of Ministers. This mainly concerns the possibility of appointing and dismissing the Council of Ministers and individual ministers (Articles 154, 158 and 159 of the Polish Constitution). Interestingly, the number of authorities appointed by the *Sejm* is expanding. Traditionally, they include constitutionally authorised authorities – that is, the National Broadcasting Council, the Supreme Audit Office and the National Bank of Poland. In addition, the *Sejm* participates in the appointment of the Presidents of central public administration authorities, such as the Chief Labour Inspectorate, the Office for Personal Data Protection and the Office of Electronic Communications. The expansion of the number of central authorities appointed by the *Sejm* is the result of the impact of European law and the need to strictly observe the independence of some public administration authorities.[53]

In practice, parliamentary control is carried out by parliamentary committees, including inquiry committees. In accordance with Article 17(2) of the *Sejm* Regulations,[54] these committees carry out control tasks within the scope specified in the Constitution and statutes. The *Sejm* committees exercise control over ministers, organs and state institutions related to the enforcement of laws, and influence the functioning of the Council of Ministers, its members and state organs.[55] Sejm

50 In Poland, the lower chamber is the most important chamber of parliament and its position is superior to the (formally) higher chamber.

51 J. Szymanek, 'Rola Senatu RP w wykonywaniu kontroli parlamentarnej (uwagi de lege lata i de lege ferenda)', *RPEiS,* vol. 66, iss. 1, 2004, pp. 15 ff.

52 A. Gwiżdż, 'Organizacja i zasady funkcjonowania', in A. Burda (ed), *Sejm Polskiej Rzeczypospolitej Ludowej*, Wrocław, Ossolineum, 1975, p. 307.

53 W. Odrowąż-Sypniewski, 'Funkcja kontrolna Sejmu na tle zagadnienia rozdziału władzy publicznej i zasady nadrzędności konstytucji', *Przegląd Sejmowy*, vol. 3, iss. 86, 2008, pp. 14–15.

54 Resolution of the *Sejm* of the Republic of Poland of 30 July 1992 – Regulations of the *Sejm* of the Republic of Poland, M.P. 2018, item 544.

55 R. Mojak, *Parlament a rząd w ustroju Trzeciej Rzeczypospolitej Polskiej*, Lublin, UMCS, 2007, p. 428.

committees may direct 'desiderates' (longer justified opinions) and opinions; or may request the Supreme Audit Office to carry out an inspection. In addition, the presidium of the commission may oblige ministers and heads of central government administration bodies, and other state offices and institutions to present reports, provide information, and participate in committee meetings at which matters relating to their scope of activity are considered.

The forms of individual parliamentary control vested in deputies are parliamentary interpellations, parliamentary inquiries, and questions about current matters. They are often addressed to the Council of Ministers and its individual members. At the same time, members of parliament often address questions to public administration bodies. In the practice of the Polish NCA, deputies often ask questions and make requests for intervention. In the vast majority of situations, this is generally in response to complaints received from voters in their constituencies. It is difficult to determine the scale of this phenomenon and its effectiveness in this respect, as the Polish NCA does not disclose this in detail. One can, however, consider the practical effectiveness of this form of control in relation to the international activities of the Polish NCA. This type of activity of the NCA generally does not fall within the sphere of interest of the vast majority of Polish voters, and the deputies themselves show quite far-reaching restraint in addressing issues outside the sphere of current politics.

Polish parliamentary practice in relation to the supervision of the activities of public administration is rather poor. The effectiveness of this supervision in a particular case depends on many factors, including the involvement of deputies and opposition, their political culture and the actual engagement of the Council of Ministers.[56] The inherently low levels of all these factors also affect the quality of parliamentary supervision in Poland. Earlier considerations revealed a profound deficiency in hierarchical administrative supervision, leaving parliamentary supervision as an interesting alternative. To revitalise such supervision, parliament must be made aware of the importance of regulatory diplomacy and the existence of TCNs, and the competences of parliamentary committees must be extended appropriately, as these bodies could methodically address such issues in their work. At the same time, parliamentary scrutiny of TCNs could be carried out jointly with, or coordinated by, national parliaments and the European Parliament.[57]

Parliamentary control seems to have theoretical potential resulting from its association with the development of independent administrative authorities and their international activities. The guarantees of independence of many public administration authorities immunise them from hierarchical administrative supervision. At the same time, judicial review is limited to standard and legally relevant administrative actions.

Meanwhile, the entire sphere of administrative policy and international cooperation of public administration remains unsupervised. In addition, parliamentary control cannot concern individual administrative acts. Instead, it consists in

56 J. Juchniewicz, 'Instrumenty realizacji funkcji kontrolnej Sejmu – próba oceny skuteczności', *PPK*, vol. 1, iss. 13, 2013, p. 32.

57 M.J. Warning, *Transnational Public Governance,* pp. 236–237.

reporting on achievements or failures in the sphere of administrative and legal regulation entrusted to a given authority, as well as on the operations of a given office and how public funds are spent. It may, for example, involve parliament obtaining information on the directions of administrative policy of a given administrative authority, its actions and their effects on the international stage. One interesting issue, especially in Poland, concerns the possible consequences of parliamentary control for a given public administration authority. These effects should be viewed in two dimensions. The formal dimension relates primarily to strengthening the legitimacy and accountability of a given public administration authority, which can certainly translate into an enhanced perception of its position, and perhaps also actual independence. This will be possible if the result of parliamentary scrutiny is positive. However, in the event of a negative result, the effects may be different. The second dimension refers to the possible effects in the material sphere. Supervision may be regarded as a form of pressure on the authority to achieve results – a lack of supervision can create even more pressure. However, parliamentary control may not involve personal measures, as the closed catalogue of grounds for dismissal from office – which is the foundation of independence of many authorities – does not include parliament's non-acceptance of the authority's policy. However, if the policy of a given authority or the results achieved are not accepted, or if there are no positive effects of the authority's activities, this may prompt parliament to cut the budget of that authority. This could also result in attempts to exercise closer control over the activities of the authority through more frequent inquiries and consultation with the authority. The *ultima ratio* of parliamentary control is to take a legislative initiative to change the legal basis for the functioning of the authority and to influence its functioning by setting new tasks or modifying its existing administrative jurisdiction. Obviously, parliament does not have full freedom in making parliamentary legislative interventions. Both the Polish Constitution and international obligations, especially under European law, set out the basic limits of parliamentary power.

9.2.9 Social control of public administration in Poland

Last but not least is the control that citizens and their associations can exercise in relation to public administration. The gist of social control is that any citizen has the right to learn about the activities of public authorities and the prerogative to demand justification for actions undertaken or a failure to act. There are no specific Polish regulations in this respect that would apply to the international activities of the Polish NCA. This means that citizens and their associations must rely on general regulations on the one hand, and on goodwill and the developed information practice of public administration bodies on the other. As regards general regulations, the Act on Access to Public Information and the Administrative Procedure Code should also be mentioned here. The former statute makes it possible to access any public information, and information on the international activities of Polish NCA is certainly public. The significance of this statute results from the fact that it enshrines a constitutional right of access to public information, where obtaining this information does not depend on the fulfilment of any subjective or objective conditions. The latter statute has a

narrower scope of application. Pursuant to Article 31(1) of the Administrative Procedure Code, a social organisation may be admitted to pending proceedings as an entity with the rights of a party where this is justified by the statutory objectives of that organisation, and where there is a public interest in it. In practice, however, the admission of social organisations to many administrative proceedings – in particular competition proceedings – is extremely unusual. Social control is an important element of the accountability of Polish public administration and the international activities of authorities, but it still has not realised even some of its potential. The negative effect of this lack of interest is, unfortunately, the reluctance of many authorities (including the Polish NCA) to comprehensively inform the public about their international activities.

9.3 Concluding remarks

The research conducted confirms that while the strengthening of instruments of international cooperation of NCAs is an ongoing trend, this has not been accompanied by a corresponding increase in procedural guarantees for parties to proceedings and third parties. It seems that this is where national legislatures have room to intervene. At the level of TCNs, it is difficult to make a binding determination on the level of protection of litigants, which will ultimately depend on the competition law enforcement regime in a given country and the related system of available legal remedies. Thus, a paradoxical situation arises in which new, sophisticated cooperation instruments are created at the level of TCNs, but the protection of the rights of parties and third parties takes place primarily at the national level (and to some extent also at the European level). At the same time, this confirms the thesis on the legitimacy of the intervention of the national legislature with regard to the directional regulation of the international cooperation undertaken by the Polish NCA, as well as of other public administration bodies that engage in similar cooperation (in respective special laws).

The analysis shows that the existing forms of supervision of the international activities of the Polish NCA are quite limited. In practice, this area of the Polish NCA's activities remains unsupervised. Generally, traditional mechanisms of hierarchical administrative supervision have weakened considerably, due to the increase in independent administrative authorities. This is surprising, since these should constitute the basic mechanism of supervision of the national and transnational activities of Polish public administration authorities. Although there are many institutions that could control the Polish NCA, the actual level of supervision is rather low, especially with respect to its international activities. By failing to provide an effective supervisory mechanism for the activities of the Polish NCA, the Polish state has given up any influence on informal international law making which takes place at the level of TCNs.[58] This is not unique to the Polish legal

58 L. Casini, 'Domestic Public Authorities within Global Networks: Institutional and Procedural Design, Accountability, and Review', in J. Pauwelyn, R.A. Wessel, J. Wouters (eds), *Informal International Lawmaking*, p. 408.

system – international researchers also note that the existence of many institutions and control mechanisms at a national level does not translate into actual supervision, which is often very limited.[59] Such limited supervision translates into limited accountability of the Polish NCA. This situation may be explained by the fact that competition enforcement is not politically salient in Poland.[60] This assumption is in line with doctrinal assumptions.[61] Significantly, the problem will become even worse due to the implementation of the ECN+ Directive. NCAs will need to be guaranteed even broader independence, while the scope of their international cooperation obligations will increase. Due to the ineffective control mechanisms at the national level, this makes the supervision of the international activities of the Polish NCA even more illusory.

This draws attention to the hidden potential of parliamentary control, which seems particularly limited in Poland. It also highlights the need to introduce additional legal mechanisms that would increase the accountability of public administration in Poland, in particular the Polish NCA. This could be done by, among other things, enhancing parliamentary control; fine-tuning the hierarchical administrative control in relation to other authorities that engage in international cooperation; and increasing the transparency of proceedings before the Polish NCA, whether by restoring the category of interested parties or implementing a better information policy. Those ideas should be treated as a package, as each of them tackles a distinct aspect of transparency and supervision. The implementation of the ECN+ Directive may present an opportunity to introduce them into law. Otherwise, there is a good chance that those ideas will be abandoned for a long time.

Finally, control mechanisms are not only intended to ensure that the supervised authorities function correctly; in the case of independent authorities – which European NCAs are already or will soon become – they are one of the basic instruments for ensuring the accountability of such authorities. Unfortunately, the ECN+ Directive completely ignores this aspect of the NCA's function, focusing only on the effectiveness of cooperation and the uniform application of European competition law. At the same time, strengthening national mechanisms of control over the functioning of NCAs in the international sphere would enhance their accountability not only at the national level, but also – paradoxically – at the transnational level. Better supervision and accountability of NCAs would translate into better supervision and accountability of TCNs.

59 A. Berman, 'The Role of Domestic Administrative Law in the Accountability of Transnational Regulatory Networks. The Case of the ICH', *IRPA Working Paper*, no 1, 2012, p. 26.

60 This may be supported by the fact that the Polish NCA and competition policy have been mentioned only once by the Polish Prime Minister in his opening address to parliament, in 2005. Available at: Sejm, The transcript of the meeting 10 November 2005, http://orka2.sejm.gov.pl/Debata5.nsf/main/614CF34D#002 (accessed 1 August 2023).

61 Ch. Koop, 'Explaining the Accountability of Independent Agencies: The Importance of Political Salience', *JPP*, vol. 31, iss. 2, 2011, p. 228.

10 Perspectives on the development of transnational competition networks

The considerations of the previous chapters make possible a comprehensive analysis of transnational competition networks (TCNs). A sizeable proportion of the observations, analyses and conclusions that have been discussed are universal in nature. This is a corollary of the fact that TCNs have become an all-embracing solution to increasingly complex and multi-jurisdictional cases that require a coordinated response from several national competition authorities (NCAs). In today's interdependent world, complicated cases involving issues such as environmental protection, crime and illegal immigration increasingly extend across national borders and administrative jurisdictions. Thus, the appropriate regulatory response must also be transnational. This presupposes the existence of working relationships between national administrative bodies that are capable of bypassing the conventional hierarchical relationships of nation states and traversing national boundaries.[1] This cooperation invariably takes the form of transnational networks, including TCNs.

The analyses conducted to date indicate that TCNs have grown in size and complexity in recent years. There are various reasons for this; but the end result is that TCNs have become a significant component of multi-stage governance, and a useful tool for expanding and strengthening international cooperation among NCAs. Academics who specialise in international public law,[2] global administrative law,[3] and

1 E.M. Busuioc, 'Friend or Foe? Inter-Agency Cooperation, Organizational Reputation, and Turf', *Pub. Adm.*, vol. 94, iss. 1, 2016, p. 40.

2 A-M. Slaughter, T. N. Hale, 'Transgovernmental Networks and Multi-Level Governance', in H. Enderlein, S. Wälti, M. Zürn (eds), *Handbook on Multi-level Governance*, Cheltenham, Edward Elgar Publishing, 2012, p. 367; A. von Bogdandy, P. Dann, 'International Composite Administration. Conceptualizing Multi-Level and Network Aspects in the Exercise of International Public Authority', in A. von Bogdandy, R. Wolfrum, J. von. Bernstorff, P. Dann, M. Goldmann (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law*, Heidelberg, Springer, 2010, pp. 896 ff.

3 P. Craig, 'Global Networks and Shared Administration', in S. Cassese (ed), *Research Handbook on Global Administrative Law*, Cheltenham, Edward Elgar Publishing, 2016, p. 171; L. Casini, 'Beyond the State: The Emergence of Global Administration', in S. Cassese, B. Carotti, L. Casini, E Cavalieri, E. MacDonald (eds), *Global Administrative Law: The Casebook*, Rome, IRPA, IILJ, 2012, pp. 30 ff, http://ssrn.com/abstract=2140384 (accessed 1 March 2021).

DOI: 10.4324/9781003376002-10

competition and consumer protection law[4] convincingly argue that the future of TCNs looks promising. It is therefore worthwhile to consider the prospects for the further development of TCNs and the opportunities for NCAs in the evolving transnational administrative climate.

10.1 TCNs and the alternative resources available for transnational cooperation of NCAs

Before analysing the developmental prospects of TCNs, it is worth considering the ways in which they differ from other transnational institutional arrangements, and whether the purposes for which they are established could be achieved by individual nation states acting alone. With regard to the first of these issues, transnational networks should consist of international organisations. International organisations are the product of international relations, and their operations are made possible by international agreements. These are universally binding sources of law, and for the most part, there are generally no issues in legitimising their operation. A further advantage of international agreements is that they strictly define the competencies and lay down the internal procedures of the international organisations involved. International organisations have legal personality, registered offices, and real-world structures. They employ human and other resources to facilitate their operations. At the same time, however, they are often seen as incumbent entities whose formalised procedures are ineffectual in practice. Moreover, their resources are limited, especially when members do not feel it necessary to actively support them. This can sometimes lead to some countries undermining the position of the organisation, and even working against it, while remaining members.

By contrast, TCNs have informal and flexible structures that can quickly adapt to changing circumstances and respond to whatever contingencies and problems arise in the transnational sphere. As TCNs do not issue binding decisions, they are not required to enter into protracted negotiations. A problem-solving orientation is more conducive to a pragmatic approach than hard bargaining. The downside of informality, however, lies in legitimising network operations. TCNs have no means of replacing binding agreements with partial or interim arrangements. This can be problematic in the case of highly politicised regulatory issues.

Some countries may regard the operations of TCNs as undermining the autonomy of their own administrations, which can lead to a loss of uniformity in transnational relations.[5] This, however, raises the question of whether national governments are in fact equipped to assume the entirety of the international cooperation that has hitherto taken place within TCNs. This would seem to be neither possible nor necessary. The current proliferation of TCNs, along with the

4 M.H. Dabbah, *International and Comparative Competition Law*, pp. 154 ff.; O. Budzinski, *The Governance of Global Competition,* pp. 218 ff.; C. Damro, T. Guay, *European Competition Policy and Globalization*, London, Palgrave Macmillan, 2016, pp. 101 ff.

5 The best example being the Chinese NCA staying outside the ICN.

considerable increase in their caseloads, would make it impossible for governments to suddenly take over their management and include them in ministerial portfolios. Moreover, a significant proportion of network cooperation takes place through soft forms of interaction (eg, seminars, conferences, study visits) and conducting cases. Including these in ministerial cooperation would only slow the whole process down without serving any useful purpose. In some cases, such as the European Competition Network (ECN), part of the network is formalised through generally binding regulations. These impose specified obligations on member NCAs (and exclude ministerial intermediation), and define membership conditions.

The options for replacing TCNs with direct intergovernmental cooperation in this situation are extremely limited. At the same time, however, TCNs are convenient for national governments, as they do not require the commitment of new resources. Existing structures and procedures can be used to achieve new goals designated by national governments. Nor is there any need to establish new international organisations, which invariably gives rise to hard bargaining and sometimes involves multifarious costs. Moreover, as TCNs are informal structures, individual nations do not officially relinquish their sovereignty and are in no way legally bound to respect their activities.[6] Similarly, attempts to create new global treaties on selected regulatory areas such as competition law and policy are not all that likely to succeed, especially in the face of an imminent world trade war. In this context, it should be noted that attempts to create binding international competition standards that could potentially give rise to an international authority have been viewed with grave misgivings by national governments. A network such as the International Competition Network (ICN) therefore allows for fully independent conduct while offering the possibility of cooperation and gradual convergence.[7]

TCNs provide a separate, flexible and effective mechanism to coordinate administrative policies. Although their budgets and resources are dwarfed by those of international organisations, their knowledge of the state of the market is considerably better, and they maintain direct contact with regulated entities and organisations on national markets. Network operating mechanisms are extraordinarily effective. TCNs enact soft law that applies transnationally. This steers the direction of the practices of NCAs, thereby ensuring that these non-binding guidelines bring about practicable results at the national level in the guise of changes to the way in which administrative jurisdiction is exercised. This makes TCNs a remarkably effective response mechanism to global issues.[8] In view of the

6 M. J. Warning, *Transnational Public Governance,* p. 41.

7 E. Lanza, 'The Relationships between EU and Global Antitrust Regulation', in E. Chiti, B.G. Mattarella (eds), *Global Administrative Law and EU Administrative Law. Relationships, Legal Issues and Comparison*, Heidelberg, Springer, 2011, pp. 232–233.

8 B. Eberlein, A.L. Newman, 'Escaping the International Governance Dilemma? Incorporated Transgovernmental Networks in the European Union', *Governance: An International Journal of Policy, Administration, and Institutions,* vol. 21, iss. 1, 2008, p. 45.

above, TCNs are definitely a viable alternative to interacting either directly or through international organisations. This underpins the claim that TCNs are here to stay for the foreseeable future,[9] at least when it comes to international cooperation in competition cases. This is because they are accessible and durable – albeit often informal – transnational cooperation mechanisms available to NCAs.

International organisations may comprise the framework to which TCNs are attached and which they will continue to utilise. In addition, with transnational justice and the requirements of business transactions being what they are, flexible transnational networks constitute a timely organisational response to the challenges to international cooperation in competition cases. The present topologies and arrangements of many TCNs are bound to evolve. This is a natural consequence of their informal nature and their structures, which are flexible and responsive to the requirements of members. Networks evolve in line with changing requirements. Some of these changes can already be identified. We begin with a discussion of the reasons for the success of TCNs, as this may help to predict their future development.

10.2 The reasons that underlie the success of TCNs and the prospects for their further development

TCNs initially emerged as a result of the internationalisation of NCAs. The internationalisation of NCAs, and consequently the development of competition policy, has been a fluid process, in which TCNs have played a major role. In recent years, cooperation among NCAs has gathered pace, mutual legal assistance has been stepped up, and more and more countries have adopted competition legislation. The proliferation and gradual coherence of competition regulations have predominantly been governed by regional and bilateral agreements. However, the prospects for full internationalisation seem remote, despite the creation of some global soft law competition standards. In these circumstances, TCNs have played a key role in developing common competition regulations by bringing NCAs together. These networks have been a crucial element in establishing a global competition management regime that derives its authority from knowledge and information.[10] At the same time – as some authors claim – networks have always existed and have even been one of the drivers of civilisation itself. They enable members to achieve many goals simultaneously.[11]

The growing significance of TCNs attests to the increasing importance and value of international cooperation among NCAs. The development of networks has been observed to result in a 'network effect': a situation in which cooperation becomes more effective as the number of cooperating entities increases. It was previously stressed that the failure of the Organisation for Economic Co-operation and Development's (OECD) efforts to broker an international agreement on

9 I. Maher, A. Papadopoulos, 'Competition Agency Networks', p. 88.
10 I. Maher, 'Competition Law in the International Domain', p. 134.
11 S. Wilks, 'Understanding Competition Policy Network in Europe', p. 65.

competition cooperation was due to the fairly limited competition network it had created under its own auspices.[12] By comparison, for example, almost all functioning NCAs in the world had become members of the ICN within little more than a decade of its establishment.[13] At the same time, the literature accurately observes that the evolution of international cooperation from soft or 'automatic' cooperation (eg, based on data that is automatically transferred periodically and made available on a common European platform) to cooperation by request is one notable trend.[14] This now includes not only the use of information from a foreign NCA, but often active cooperation in taking administrative action.

The legal doctrine points to various factors that have favoured increased transnational relations and the rise of TCNs. There are three reasons for the prodigious development of transnational administrative networks, especially with respect to shaping economic policy:

- the growth and perceptions of globalisation;
- the changing nature of international trade and the influence that transnational corporations have exerted on it; and
- the changing functionality of contemporary nations in the direction of regulating (rather than merely participating in) markets and delegating regulatory authority to independent specialist government bodies/agencies.[15]

Moreover, cooperation within transnational networks develops best when the networks operate in areas which involve a great deal of risk and uncertainty, and which are technically complicated and not easy to sell politically.[16] Not only that, but developing a network to cover a particular area can promote the convergence of members' public policy goals and the homogenisation of national legislation in that area. It should also encourage reasonably well-functioning public administration structures committed to the network; grant a relatively high degree of independence to the national administrations involved; and ensure the continued existence of the cooperative mechanisms already in operation within international organisations.[17] Competition law and the functioning of NCAs constitute a prime example of the accuracy of these observations.

There are other factors that have been conducive to the development of transnational administrative networks. The first is the increasing functional

12 P.J. Lloyd, K.M. Vautier, *Promoting Competition in Global Markets: A Multi-National Approach*, Cheltenham, Edward Elgar Publishing, 1999, pp. 49–50.
13 The only exception concerned the Chinese NCA.
14 E. Cisowska-Sakrajda, J. Wegner-Kowalska, 'Współpraca międzynarodowa państw a standardy pomocy w sprawach podatkowych', in Z. Czarnik, J. Posłuszny, L. Żukowski (ed), *Internacjonalizacja administracji,* p. 389.
15 S. Picciotto, 'Networks in International Integration', p. 1018.
16 B. Eberlein, 'Policy Coordination without Centralization?', p. 151.
17 C.A. Whytock, 'A Rational Design Theory of Transgovernmentalism: The Case of E.U.–U.S. Merger Review Cooperation', *Boston University International Law Journal,* vol. 23, iss. 1, 2005, pp. 48–49.

interdependence between nations. This increased economic, social and ecological interdependence has deprived individual nations of the ability to control many situations and events in a centralised and hierarchical manner. Globalisation has significantly restricted the options open to national regulatory bodies, while creating new problems that can only be resolved by several countries working together.[18] The second is the far-reaching convergence in the functioning of countries. This has significantly contributed to public cases being managed in a similar way across jurisdictions,[19] and has made cooperation between independent regulatory agencies considerably simpler and more effective. The third is the growing realisation that a significant proportion of the problems now cropping up are technical in nature and of sufficient complexity to put their resolution beyond the capabilities of diplomats and public servants employed in foreign affairs ministries, necessitating the expertise of specialised administrative bodies.[20] Finally, it is clear that technological progress has significantly facilitated mutual transborder contacts. This has made TCNs considerably simpler to set up; while new technology has also made them considerably less expensive to maintain.[21] This is especially apparent from the exponential increase in virtual cooperation resulting from COVID-19 restrictions.

One characteristic feature of the growth of transnational administrative networks is its unevenness. Networks are developing rapidly in some spheres of life, but have little significance in others. Despite conditions being identical and generally favourable to making networks more relevant, their growth is invariably dependent on the specifics of given regulatory areas, which can either foster or impede the development of transnational administrative networks. Despite this uneven development, the strength of networks lies in their sheer number. A glance at international competition law reveals an extensive web of bilateral, regional and multilateral forms of cooperation that differ in their aims and scope. This is sometimes defined as a 'network of networks'.[22] A natural consequence of this mosaic of connections is that every NCA is influenced by at least one transnational network, and involvement in one easily develops into further connections. This network of networks enables any interested NCA to choose how it interacts with its opposite numbers. At the same time, it manifestly leads to a natural selection of cooperation forums and results in the survival of those which are best suited to the requirements of members.

10.3 The strengths and weaknesses of TCNs

Following on from this discussion of why TCNs are both abundant and popular, it is also worth enumerating their advantages and disadvantages. Identifying their

18 M. Eilstrup-Sangiovani, 'Varieties of Cooperation', p. 7.
19 K. Raustiala, 'The Architecture of International Cooperation', p. 14.
20 M. Eilstrup-Sangiovani, 'Varieties of Cooperation', p. 8.
21 K. Raustiala, 'The Architecture of International Cooperation', p. 13.
22 A. Ezrachi, 'Setting the Scene. The Scope and Limits of International Competition Law', in A. Ezrachi (ed), *Research Handbook on International Competition Law*, p. 9.

positive and negative features can assist in evaluating whether they will survive and develop further, or simply fall into disuse and disappear. The downside of cooperating via networks is especially relevant, as this may prove crucial to the further development of TCNs.

In highlighting the advantages of cooperation within TCNs, it should be stressed that they efficiently assimilate the knowledge, resources, information and experience of their different members. They can access the various resources available and combine and assemble them to achieve specific ends. Moreover, TCNs guarantee the efficient flow and exchange of information, disseminating knowledge and promoting innovation among members. TCNs also empower their members: affiliation with a network strengthens a member's position and helps it to achieve its aims. TCNs also provide flexibility and the ability to adapt to changing conditions.[23]

TCNs are fast, flexible and decentralised, which allows them to function well under rapidly changing economic conditions.[24] There are three key features that make TCNs such an effective vehicle for cooperation. First, they provide a forum in which to test various forms of cooperation, sharing and learning. The exchange of information leads to better understanding and more extensive cooperation – cooperation which is flexible and which can cater to constant change and be tailored to meet evolving requirements. Second, TCNs present favourable opportunities to coordinate cooperation between NCAs. This applies to coordinating the adoption of common soft law regulations as well as administrative cooperation. Third, TCNs present a normatively attractive version of world governance. Since they comprise administrative authorities, their operations are legitimised on the basis of binding national legal regulations. This is superior to any legitimisation that transnational organisations can provide. Moreover, TCNs do not enact binding norms in a transnational forum, but adopt soft standards, which they can later lobby to have converted into hard national legal regulations that retain all the safeguards of the legislative process.[25]

Paradoxically, the strengths of TCNs may simultaneously be their weaknesses. A loose and informal structure may be the most efficient and effective means of organisation when decisions must be made quickly; but the downside is that it can result in opaque decision-making processes and a lack of accountability. Legitimising the operation of the TCN is another issue: while the voluntary nature of TCNs encourages participation, it simultaneously guarantees that members can avoid the consequences of decisions or arrangements that they do not deem to be in their interests. Interaction in TCNs largely depends on the will of the members; some network members may be passive, yet still remain part of the TCN. The flow of information is important and delivers positive results for everyone. However,

23 M. Eilstrup-Sangiovani, 'Global Governance Networks', pp. 694–696.

24 A.-M. Slaughter, 'The Accountability of Government Networks', *Indiana Journal of Global Legal Studies*, vol. 8, iss. 2, 2001, p. 347.

25 P. Marsden, 'The Curious Incident of Positive Comity: The Dog that Didn't Bark (and the Trade Dogs that Just Might Bite)', in A. T. Guzman (ed), *Cooperation, Comity, and Competition Policy*, Oxford, OUP, 2010, p. 317.

not everyone always has the ability or the desire to share information. This can lead to asymmetrical investment in the TCN and can defeat the purpose of having active members share knowledge and information. In the longer term, however, free riding often becomes apparent to other members, resulting in a strong disinclination to work with the offending member. Moreover, although all members are officially equal, some NCAs from smaller jurisdictions may have reservations about working with powerful authorities from major jurisdictions, as this cooperation may not be uniform and the more powerful members may come to dominate.

The main problem with TCNs may be that, while they are perceived as technocratic and neutral, in practice they often serve as an extension of the rivalry between major countries or transnational organisations. There are two competing models (EU and US) in international regulatory policy. These constitute templates for assimilating the national regulations of many jurisdictions. This competition between models often impedes the development of international rules that could form the basis of a workable global governance.[26] These disagreements have been apparent in, for example, the workings of the World Trade Organization (WTO) and the OECD; and the establishment of the ICN and the initial phase of its operations. On the one hand, it is hard to fault this line of reasoning; but on the other, it is hard not to recognise that this problem is universal in nature and besets all transnational and international activities that involve official contacts between countries or their administrative authorities. Moreover, over time, this rivalry seems to have been overcome and even reframed as something positive in the form of soft law acts and other documents; and more importantly, it seems to have created something of a global community among NCAs and their staff. The ICN is especially instructive in this regard.

In addition to these more general issues, there are also more specific problems relating to TCNs themselves. Some suggest that the main challenges to the development of TCNs concern overlapping competencies of agencies and duplicated membership of networks.[27] The former issue relates to overlapping competencies between networks of sectoral regulators and TCNs; but this is not borne out in practice. While overlapping competencies can stymie cooperation between authorities at a national level, there are virtually no analogous regulations at the transnational level to establish cooperation between networks. Moreover, given that – for better or worse – cooperation problems are addressed as they arise, it is difficult to expect that these would be translated to the transnational level. The latter issue arises where the same national authorities are empowered to perform more than one function and are members of several different kinds of networks (eg, the ECN and the Consumer Protection Cooperation Network). According to this view, problems can arise in relation to the standard protection of transferred information, which differs between these two networks.[28] However, this danger is

26 K. Schulze, J. Tosun, 'Rival Regulatory Regimes in International Environmental Politics: The Case of Biosafety', *Pub. Adm.*, vol. 94, iss. 1, 2016, p. 57.

27 S. Brammer, *Co-operation Between National Competition Agencies*, pp. 504 ff.

28 Ibid, p. 506.

more theoretical than practical in nature. The practice of the Polish NCA[29] shows that having two separate regulatory regimes for competition and consumer protection has never resulted in the confusion of competencies or the erroneous application of the provisions regulating the operation of some other transnational network.[30] If anything, the opposite pattern is evident: as a membership of one transnational network, an NCA learns how to cooperate internationally, and can more easily adapt to cooperation in the event that it joins another – even in a different area of enforcement.

To return to the development of TCNs, the international activity of NCAs clearly has its limits (the most obvious being budgetary constraints). As a result, the involvement of NCAs in particular networks differs in manner and extent, resulting in something of a natural selection of cooperation forums. Network cooperation under the aegis of traditional international organisations – such as the WTO, UNCTAD and the OECD – thus seems to be playing a diminishing role. These bodies may well have to change or limit the scope of their activity. At the same time, formal European administrative networks are playing an increasing role. Membership is *de facto* obligatory, as it involves the fulfilment of obligations imposed by European law. Informal, and most often virtual, TCNs are a way to develop international cooperation between NCAs, but on the principle of voluntariness and without incurring any obligations.

From an analysis of the strengths and weaknesses of network operations, we can conclude that the former result from the essence of TCNs and their universal potential, which can be developed under widely variable conditions. Describing the strengths of TCNs involves identifying the theoretical and potentially positive impact of their operation. However, whether this potential can be fully utilised in a given case will mainly depend on the NCAs involved in the network and the resources invested in this cooperation. This is especially important over the long term if the initial enthusiasm wanes and/or the prevailing political conditions become less supportive. The NCAs involved in a TCN must evaluate their commitment to it and its importance to them. The negatives that most frequently crop up in practice must further be borne in mind when focusing on the positives, as these delineate the limits of the effectiveness of TCNs. Interaction in a TCN predominantly depends on the desire and goodwill of the members and is based on reciprocal trust. Cooperation can be very effective and the vast majority of network weaknesses can be eliminated if the members appreciate its value.

10.4 TCNs as a 'necessary evil' for NCAs

Depending on the type of TCN, the freedom for NCAs to join or leave the network may be limited. Formally, it is always possible to join or leave an informal

29 The Polish NCA combines the functions of competition and consumer protection.

30 This situation may be explained by the fact that, although they operate within the same authority, the competition protection and consumer protection units remain *de facto* separate. This is another issue that simultaneously supports the argument that the results of the synergy that comes from combining competition and consumer protection in a single authority are far from evident.

TCN. While entry conditions sometimes apply, there are seldom any exit procedures. In this situation, submitting a withdrawal declaration or simply ceasing activity is tantamount to a withdrawal. In the case of TCNs in international organisations, NCAs become members as soon as their countries join the organisation. In this regard, NCAs themselves are unable to object. Nevertheless, they are encumbered with the responsibility of meeting the specific obligations that membership entails. Similarly, an NCA can exit from this sort of formal network if the country in which it is based decides to leave the organisation or a branch of it, or to resign from a particular programme. NCAs involved in a network operating within an international organisation cannot independently decide to exit it.

In practice, however, national governments may have limited powers to compel an NCA to leave a TCN – even an informal one. First, NCAs are formally network members. As these authorities have been often endowed with independence, national governments cannot order them to leave a TCN. Second, the costs of withdrawing from international cooperation in a given area can be inordinately high. It can be much more difficult to conduct cases without access to the information and expertise of other NCAs or without their legal and informal assistance. Furthermore, withdrawing from one TCN can impact international cooperation in other areas, to say nothing of possibly burdening future cooperation. Apart from that, the sunk costs of leaving a TCN increase commensurately with the time that has been spent working within it.[31]

It is equally hard to imagine leaving a formalised network while staying in the international organisation of which it is part or remaining a party to an international agreement establishing the TCN. To take one example, an EU NCA cannot simply leave the ECN unless that particular EU state leaves the European Union. Curiously, joining the ECN was essentially voluntary, as each member simply made a statement to that effect. However, NCAs would have been unable to discharge their obligations under Regulation 1/2003 unless this statement had been made. At the same time, neither Regulation 1/2003 nor the ECN+ Directive provides for the option of leaving the ECN (apart from ceasing to be bound by the *acquis communautaire* by virtue of leaving the European Union).

European administrative networks were set up to manage strategic political and economic (especially infrastructural) fields. The ECN is no exception. However, the sweeping deregulation of these areas has raised several questions as to how the activities of the responsible administrative authorities should be coordinated. Networks offer a compromise by offsetting the need to strengthen integration against the insistence of maintaining national sovereignty. This, however, is something of a 'second-best' solution, as networks are not vested with adequate authority, power and resources. Another important consideration is that European administrative networks must compete with existing international and European networks.[32] No compromise lasts forever, though. This is amply illustrated by the EU policy to covert some networks into network agencies (eg, the Agency for the

31 B. Eberlein, *Policy Coordination without Centralization?,* pp. 149–150.

32 D. Coen, M. Thatcher, 'Network Governance and Multi-Level Delegation', pp. 66–67.

Cooperation of Energy Regulators and the Body of European Regulators for Electronic Communications). Although the networks were not dissolved, the new EU agencies resulted in a rearrangement of the relationships between the national regulatory bodies. Transnational networks are less hierarchical and more open and more collegiate means of governance than network agencies.[33] Through that prism, the ECN and competition policy constitute an example of one area where a network path remains the preferred option supported by all interested parties.

The above considerations suggest that the voluntariness of the involvement of NCAs in TCNs may in some cases be illusory. This may be best described in terms of the Marxist concept that 'freedom is a recognised necessity'.[34] This is a result of formal issues on the one hand, and of the sunk costs incurred in cooperating on the other. In many cases, the benefits that TCNs bring for NCAs compensate for the disadvantages of working through a network. Moreover, developing TCNs such as the ECN can be a prescription for far-reaching continental integration and a way to safeguard the independence of NCAs by preventing them from being subjected to, or incorporated in, transnational administrative authorities. New ways of dealing with this issue can be expected, especially in the European Union: the European Commission will endeavour to create network agencies, whereas member states will have a preference for European administrative networks such as the ECN. At the current stage of development of a composite European administration, it is hard to tell which of these solutions will prevail.

10.5 TCNs and the convergence and harmonisation of law and administrative practice

TCNs create spaces in which independent NCAs deliberate on issues that are relevant to their cooperative efforts and goals. Over time, this leads to the stabilisation and harmonisation of internal normative values and structures across the network.[35] TCNs are essentially informal mechanisms to facilitate cooperation among NCAs, and are usually based on the non-binding soft law provisions created within them. These provisions comprise an effective mechanism for the convergence of national provisions. In the case of many sectoral regulations, including competition law, this turns out to be a much better option in practice than having harmonisation formally imposed by international treaty. The convergence that results from previously adopted non-binding soft law provisions avoids the cost of adopting official and binding international provisions and incorporating them into domestic legislation. It also obviates the need for political bargaining, while enabling national provisions to be converged to the extent that this accords with the interests of member states. However, TCN members that consider these

33 D. Levi-Faur, 'Regulatory Networks and Regulatory Agencification. Towards a Single European Regulatory Space', *JEPP Policy*, vol. 18, iss. 6, 2011, p. 812.

34 F. Engels, *Anti-Dühring*, Warsaw, Książka i Wiedza, 1949, p. 112.

35 R. Schmidt, *Regulatory Integration Across Borders. Public-Private Cooperation in Transnational Regulation*, CUP, Cambridge 2020, pp. 103–104.

provisions to be contrary to their interests have the flexibility to repeal or modify them at the national level without officially violating the norms of international law.[36] NCAs working together and adopting soft law through TCNs is therefore an extraordinarily appealing instrument for promoting the convergence of national competition provisions.

The legitimacy of converging or harmonising national competition regimes has raised certain questions in the legal doctrine. Many arguments have been formulated in support of the necessity of doing so.[37] It must be appreciated that there are no definitive answers to these questions; rather, the answer given will always depend on the specific interests of the entity that gives it. Multinational corporations may have their own views on the harmonisation of international competition provisions; as might consumer organisations, legal firms and developed and developing countries. For this reason, the legitimacy of harmonisation or convergence is not further considered here. However, the convergence or harmonisation that results from the operation of transnational administrative networks must be addressed in terms of its further development.

First, it is necessary to distinguish between convergence and harmonisation. Convergence involves the voluntary approximation of national legislation and/or administrative practice to international standards. Harmonisation involves the obligatory enactment of relevant national provisions to comply with international norms. As convergence is voluntary, it presupposes the willingness of the interested countries or authorities. This willingness is often evidenced by previous decisions with respect to the soft law norms that set the standard for convergence. As convergence is a process, it can be assumed that a specified standard can be approached in stages. A corollary of the voluntary and progressive nature of convergence is that a given country or government authority, respectively, might never quite meet the desired legal or administrative standards. Convergence further presupposes that every country sets the timeframe and extent of its engagement in accordance with its capabilities and requirements. Harmonisation, by contrast, leaves those countries that have committed to it with no choice: it must be effected within a legally specified period and national norms must comply fully with the standard of harmonisation. TCNs do not have executive authority and therefore cannot impose harmonisation on their members; but most of the networks that have been studied in this book have a convergent nature or component. Importantly, convergence need not be an explicitly stated goal. However, progressive administrative cooperation – and especially the implementation of the resulting guidelines and best practices – make convergence a *de facto* outcome of network operations.

Convergence and harmonisation can proceed in parallel, although the former often precedes the latter. The development of competition provisions is an

36 A. Bradford, 'International Antitrust Cooperation and the Preference for Nonbinding Regimes', in A.T. Guzman (ed), *Cooperation, Comity, and Competition Policy*, p. 331.

37 For a summary, see A. Mitschke, *The Influence of National Competition Policy on the International Competitiveness of Nations*, Springer, Heidelberg 2008, pp. 15 ff.

excellent example of this. National competition protection systems can progressively converge and harmonise with both EU and international norms as a result of the operation of TCNs. The best example of national administrative provisions converging and harmonising in tandem is the marked impact that European administrative networks have had on the European Union. While EU law does not contain general procedural rules for every administrative case in which EU law is applied (by national administrations as well as by EU authorities and agencies), such rules have been implemented in many sectoral regulations.[38] This is especially the case in the sectors in which transnational administrative networks function. This results in uniformity among the authorities in the network, along with the extensive convergence of their rules and procedures; and at a later stage, in the harmonisation of the procedural, substantive and legal rules that they administer. The best example of this is the ECN, which was set up as an administrative network and acquired a convergent nature over time, and whose establishment directly resulted in the progressive convergence of the legal and substantive provisions of member states.[39] The ECN has adopted many soft law acts, which member states have subsequently incorporated voluntarily into their national law. This process will become one of harmonising provisions once the ECN+ Directive has been fully implemented, and will involve the harmonisation of procedural and organisational provisions in addition to the existing harmonisation of substantive norms. It can be assumed that the ECN will continue to adopt soft law acts even after some of the provisions have been harmonised. This shows that while convergence might precede harmonisation, this is a cyclical rather than a finite process. The net result could theoretically be the complete harmonisation of provisions. However, this would render national competition protection systems redundant, as the field would be fully covered by EU regulations. The creation of a European competition protection authority may be a logical supplement to this process; but this prospect seems fairly remote. At present, there is a lack of political will to implement such advanced legal and institutional changes.

Harmonisation in the European administrative space requires a clear legal basis. Thus, it would only be broadly applicable in advanced continental integration processes implemented by means of official administrative networks. The fundamental means available to informal transnational administrative bodies to influence their members is to stimulate the convergence of administrative practice and legal provisions. The absence of any prospect for an international competition treaty is a further argument for confining the activities of TCNs to promoting the convergence of national administrative practices and provisions. The impact of transnational networks, at least in their present form, is dwindling in this regulatory field. The ICN has adopted guidelines and best practices on all key areas of

38 P. Craig, 'A General Law on Administrative Procedure, Legislative Competence and Judicial Competence', *EPL*, vol. 19, iss. 3, 2013, pp. 504–505.

39 K.J. Cseres, 'Questions of Legitimacy in the Europeanization of Competition Law Procedures of the EU Member States', *Amsterdam Centre for European Law and Governance Working Paper*, no 2, 2013, p. 13 ff, https://ssrn.com/abstract=2213192 (accessed 1 March 2021).

competition law. This makes monitoring their implementation all the more important. Adopting new guidelines or updating existing ones whenever new issues arise remains an important part of network operations. It must be assumed, however, that TCNs will be assigned greater weight in monitoring the compliance of national legislation with adopted soft law norms.

The foregoing considerations suggest that TCNs effectively lead to the convergence of administrative practice, frequently followed by binding provisions. This is a natural process, through which the NCAs functioning in the network learn from each other and adopt best practices. At the same time, the universality of the norms of competition law (especially substantive rules) makes convergence relatively simple. Although it is technically possible to predict the full global convergence of competition provisions, it is worth noting that, even under the continental integration model that has advanced the furthest – that is, the European Union – this has not been completely achieved. In this situation, it can be assumed that TCNs will be a catalyst for continued convergence, although its extent and pace will largely depend on external factors that are independent of NCAs.

10.6 Concluding remarks

The expression 'from roots to codes to networks' is a fitting summary of the preceding analysis of the development of international competition regulations.[40] Competition was initially only regulated in certain countries and laws were expressly national in their substance, intent and scope of application. The next step was to attempt to draft universal competition regulations in the form of an international treaty or code. These efforts resulted in complete failure. In response, NCAs chose to work together through TCNs, which proved to be a highly effective catalyst for international cooperation among NCAs and led to the progressive convergence of national competition provisions.

The mainstays of TCNs are their variation and, for the vast majority of them, the informality of interaction. The success of the ICN is the best example of this. For this reason, its continued development depends on maintaining its existing nature. In particular, this involves operating virtually and resisting the temptation to establish a physical presence; focusing solely on competition issues and not being distracted by sectoral regulations; and retaining the non-binding nature of adopted norms.[41] A comparison of the main global competition networks reveals that the ICN best answers the current needs of NCAs. The OECD, as the 'expert' development path, has proved too hermetic for most NCAs. Similarly, the 'static' path – that is, the WTO – being based on international negotiations, has not led

40 E.M. Fox, 'From Roots to Codes to Networks', in A.T. Guzman (ed), *Cooperation, Comity, and Competition Policy*, p. 265.

41 P. Marsden, '"Jaw-Jaw" not "Law-Law" – From Treaties to Meetings: The Increasing Informality and Effectiveness of International Cooperation', in A. Ezrachi (ed), *Research Handbook on International Competition Law*, pp. 130 ff.

to favourable results. The ICN, which represents the 'communal' path, thus seems to be the optimal solution.[42] The ICN appears to deliver the most on which NCAs can agree, with maximum achievable benefits, by creating global competition rules and maintaining a global competition network. It should not be understood as unconditional appraisal of the ICN model. In fact, there are growing criticisms of the ICN's deficiencies, such as the lack of true equality of members, the promotion of a Western (US) model of competition law and the lack of proper legitimacy.[43] However, these drawbacks do not undermine the ICN's achievements, but rather show that the ICN needs some improvements in order to better serve its members and achieve its goals.

When the ECN was established, it was emphasised that this network could give rise to more subcontinental European competition networks. These networks would supposedly enable members to communicate even faster and more effectively and efficiently, frequently driven by a common language, shared traditions of working together and common interests.[44] It seems today that this prognosis was only partially correct; it has been most accurate in the case of the Nordic Cooperation, which continues to improve and expand today. To a lesser extent, there is also cooperation between the Baltic competition agencies, although this is based on informal instruments. It is hard to say what external benefits this brings, apart from annual meetings. By contrast, every attempt of Central and Eastern European countries to build a network has resulted in failure; neither the Central European Competition Initiative nor the Marchfeld Forum has stood the test of time. This potential may be tapped again in the future; but there would have to be a genuine desire on the part of all interested agencies, which does not seem to be the case at present. There were once even bolder predictions that the ECN could transcend Europe and become a model for global competition federalism.[45] This, however, was naïve and divorced from political reality. The ongoing global trade war, which began in 2017, has relegated global competition federalism to the realm of distant dreams.

Further changes have been advocated for the ECN to build on its success. A postulate to have the ECN promote competition more vigorously was formulated within the network itself.[46] This French proposal assumes that the ECN would become a more autonomous EU administrative entity whose voice would be independent of those of its individual members. If adopted, this would inevitably lead to the ECN becoming politicised. The ECN could then cease to be seen as purely technocratic and neutral, and start to play an active part in EU politics. As interesting as this proposal might appear, it could raise well-founded concerns that

42 M.-L. Djelic, T. Kleiner, 'The International Competition Network', pp. 304 ff.
43 Ch. Townley, M. Guidi, M. Tavares, *The Law and Politics of Global Competition*, pp. 232 ff.
44 D. J. Gerber, 'The Evolution of a European Competition Law Network', p. 50.
45 E. Lanza, *The Relationships between EU and Global Antitrust Regulation*, p. 243.
46 B. Lasserre, 'The Future of the European Competition Network', 21st St. Gallen International Competition Law Forum ICF, St. Gallen, ICF, 2014, p. 7, https://ssrn.com/abstract=2567620 (accessed 3 May 2021).

it would strengthen the position of the European Commission, which would then increasingly use the ECN as a sounding board for its own ideas; or that it could strengthen the position of the largest NCAs in the network, which – with the French NCA at the vanguard – have long been calling for deeper integration. The proposal might thus be more of a hindrance than a help to the functioning and development of the ECN. There have also been proposals to further formalise the ECN and extend procedural safeguards to parties involved in disputes, and to fully observe EU law on good administration.[47] This last proposal seems to have been partly realised by the ECN+ Directive. However, it should be emphasised that the network as such does not exercise any administrative jurisdiction. Responsibility for this lies with the agencies that created the network and which implement domestic or EU (where EU law is directly applicable) procedural safeguards. Further formalisation may result in the network becoming less operationally flexible and the position of the European Union being strengthened. As such, it is guaranteed to meet with a negative response from many EU member states.

The proposal to transform the ECN into an administrative body is probably the most far-reaching in its history.[48] However, such ideas should be treated as pure academic speculation rather than as well-founded research projections. First, such a model of implementing EU law has no application in any European administrative sphere. Moreover, it is hard to imagine any EU member state ever agreeing to have its domestic administrative bodies exercise national administrative jurisdiction in the capacity of a 'branch office' of an EU body or institution. Second, it is highly unlikely that such a body would ever be created, as the various EU member states follow different models of publicly implementing competition law. Some of them have even vested this jurisdiction in specialised competition courts. Integrating all these institutional arrangements would be no mean feat and it is hard to see any rational justification for doing so. Third, such a move would inevitably be dysfunctional in the longer term, as the European Commission did not divest itself of the obligation to hear minor cases only to assume this once more down the line. Such an organisation would also be enormous, and would have a complex and highly diverse territorial structure. All this adds up to less effective and efficient management. Fourth, creating a homogeneous and centralised structure would undo all the advantages of having competition regulations implemented via a network – that is, flexibility, informality, mutual recognition of independence and optimal allocation of power and resources. For these reasons, building up NCAs institutionally and materially while strengthening and enhancing the means by which the European Commission can influence them would be far more important to the European Commission. This would allow the Commission to achieve its own particular aims without assuming responsibility for the operations of any NCA. That is what makes any discussion of converting the ECN

47 E. Csatlós, 'The European Competition Network in the European Administrative System: Theoretical Concerns', *YARS*, vol. 11, iss. 17, 2018, pp. 68 ff.

48 K. Dobosz, *Jednolitość stosowania prawa konkurencji Unii Europejskiej przez organy i sądy państw członkowskich*, Warsaw, WK, 2018, p. 147.

into an EU administrative agency purely speculative. Moreover, such discussions can be grating, with their conventional vision of building an administrative apparatus and their failure to consider new forms of managing public affairs (especially transnational ones), which need not be based on hierarchical models.

Expanding cooperation within the ECN by incorporating merger control has also been advocated. This is currently based on the informal EU Merger Working Group (MWG) network and the division of authority and power between EU and national competition authorities.[49] This idea was conceived in France and articulates the interests of the larger EU jurisdictions. Homogeneous merger control rules would create more opportunities for the larger national jurisdictions to influence merger decisions. They would also strengthen the position of the European Commission. This proposal, however, ignores the prevailing political conditions in the European Union. Merger control is far more politicised than antitrust provisions. Incidentally, this is why these provisions, along with international cooperation in this area, were developed later.[50] Moreover, the differences between substantive merger rules are considerably more far-reaching than those between antitrust provisions. Most relevantly, the system of merger control in Europe in based on jurisdictional separation and exclusivity, and not on the concurrent application of national and European rules, as is the case with competition provisions. All of this makes it legally impossible and unjustifiable to cooperate on competition cases through the ECN. By contrast, there could be no better legal justification for formalising the EU MWG and converting it into an extended European administrative network.[51]

TCNs involving NCAs are not the only transnational networks that may be active in competition matters. Several proposals to increase cooperation and create a network of national courts to decide competition cases have been submitted. Court networks are the subject of separate analyses.[52] A network of European competition courts could operate in parallel with the ECN and cooperate closely with it.[53] Member courts of such a network would have to apply the same law (eg, EU competition law) for it to effectively complement the European administrative network. This idea, however, should be examined from a broader perspective than that of competition courts alone. First, the European Commission has already set up two formal EU networks of judges: the European Judicial Network (criminal

49 F. Zivy, *Making Merger Control Simpler and More Consistent in Europe: A "Win – Win" Agenda in Support of Competitiveness, Report to the Ministry for Economy and Finance*, Paris, Autorité de la concurrence, 2013, pp. 28 ff, https://www.economie.gouv.fr/files/rapport_concentrations-transfrontalieres_en.pdf (accessed 3 May 2018).

50 M. Błachucki, 'Umiędzynarodowienie procesów kontroli koncentracji przedsiębiorców', in B. Polszakiewicz, J. Boelhke (eds), *Procesy integracyjne i dezintegracyjne we współczesnej gospodarce,* Part II, Toruń, Publishing House of UMK, 2012, pp. 139 ff.

51 M. Błachucki, 'The Evolution of Competition Authorities' Networks and the Future of Cooperation between NCAs in Europe', *OZK*, vol. 4, 2018, p. 127.

52 J.M. Box-Steffensmeier, D.P. Christenson, C. Leavitt, 'Judicial Networks', in J.N. Victor, A.H. Montgomery, M. Lubell (eds), *The Oxford Handbook of Political Networks,* pp. 491 ff.

53 B. Lasserre, *The Future of the European Competition Network*, p. 4.

courts)[54] and the European Judicial Network in Civil and Commercial Matters.[55] Judges themselves have set up many networks – for example, for judges of administrative[56] and constitutional courts,[57] and for judges of courts that specialise in matters such as competition law.[58] These networks have a more instructional and informative complexion, and fall outside the purview of the courts. At the same time, it should be stressed that European courts more frequently enter into dialogue and build relationships with each other. This is fostered, first, by the ability to submit prejudicial questions, as well as the unifying role of the Court of Justice of the European Union; and second, by the ability of domestic courts to invoke each other's judgments. This is also a form of 'dialogue through judicial decisions'.[59] Developing a network of courts is one of the objectives of the European Commission. The networks themselves have become a permanent feature of the EU legal landscape.[60] The existing association of competition court judges is the best example of this. However, whether networks of judges can effectively progress beyond informative activities is an open question. This does not seem possible unless profound legal changes – which would have to include competition law and procedural rules – are implemented. For this reason, the informative nature of networks of judges should be exploited to the full – achieving mutual recognition, improving qualifications, establishing a common judgment database, and commenting on legal changes should all provide a solid basis on which to build mutual confidence in authoritative European competition court judges. At the same time, these networks can be expected to exist in parallel with the ECN, European Competition Authorities and the EU MWG. There thus seems little hope of greater contact between networks of NCAs and networks of judges.

Parliamentary, alongside administrative and judicial, cooperation may serve to complement increased and enhanced cooperation within TCNs. Legislative networks are already being analysed in the legal doctrine.[61] Within the European Union, national parliaments are increasingly working with each other directly.

54 European Judicial Network – EJN, https://www.ejn-crimjust.europa.eu/ejn/EJN_Home.aspx (accessed 3 May 2021).
55 European Judicial Network in Civil and Commercial Matters – EJNCCM, http://ec.europa.eu/civiljustice/index_en.htm (accessed 3 May 2021).
56 Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union, http://www.juradmin.eu/en/home_en.html (accessed 3 May 2021).
57 Conference of European Constitutional Courts – CECC, http://www.confcoconsteu.org/ (accessed 3 May 2021).
58 Discussed in Chapter 8.
59 M. de Visser, M. Claes, 'Judicial Networks', in P. Larouche, P. Cserne (eds), *National Legal Systems and Globalization. New Role, Continuing Relevance*, The Hague, T.M.C. Asser Press, 2003, pp. 354 ff.
60 Ibid, p. 366.
61 N. Ringe, J.N. Victor, W.K. Tam Chao, 'Legislative Networks', in J.N. Victor, A.H. Montgomery, M. Lubell (eds), *The Oxford Handbook of Political Networks,* pp. 471 ff.

Cooperation between parliaments, however, seems in large measure to concern matters of serious political importance. Competition law would not seem to qualify as such. In this situation, it is hard to see how the existing and emerging parliamentary cooperation could be transformed into a parliamentary network capable of dealing with competition law.

11 Conclusions

Cooperation between national competition authorities (NCAs) is essential in order to meet the challenges of enforcing competition law in an increasingly interconnected world.[1] Transnational competition networks (TCNs) play a key role in the development of competition law and international cooperation among NCAs. These processes occur in parallel and are mutually reinforcing, with TCNs acting as a catalyst. Without TCNs, competition law would not have spread so quickly and evolved so far. These networks have made it possible for NCAs to get to know each other and cooperate internationally on an unprecedented scale. It is worth noting that virtually every advanced regional or continental integration project has led to the creation or expansion of existing TCNs. These networks are influencing the normative and administrative environments at the national and supranational level, and can be seen as bridges connecting these two levels of governance in the bureaucratic and operational realms of cooperation.[2] One important aspect of the interaction of NCAs within TCNs is its informal nature. Importantly, this preference is persistent and states still opt for informal cooperation even where they have the opportunity to transform this into formal cooperation (whether through the conclusion of a formal international agreement or the establishment of an international organisation). This means that TCNs are not just a substitute and temporary solution for transnational interaction between administrations, but rather a permanent and expanding form of such interaction.[3] The establishment of the Arab Competition Network in Spring 2022 provides the latest evidence of this observation.

This review of TCNs reveals their great diversity and heterogeneity. The analysis also shows that the development of TCNs has been possible precisely thanks to their diversity, the flexibility of cooperation within the network and the freedom

1 OECD, International Co-operation on Competition Investigations and Proceedings: Progress in Implementing the 2014 OECD Recommendation, 2022, p. 9, https://www.oecd.org/daf/competition/international-cooperation-on-competitioninvestigations-and-proceedings-progress-in-implementing-the-2014-recommendation.htm (accessed 13 June 2022).

2 S. Hollis, 'The Necessity of Protection: Transgovernmental Networks and EU Security Governance', *Cooperation and Conflict*, vol. 45, iss. 3, 2010, p. 325.

3 A. Bradford, 'International Antitrust Cooperation', pp. 321–322.

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to adapt the forms and scope of this cooperation to the current needs of member NCAs. NCAs are usually free to choose the TCNs in which they wish to participate and the extent to which they wish to do so; as a result, some TCNs have lost their importance or even fizzled out altogether, while others have grown. What is more important, however, is the increase in the amount and intensity of cooperation among NCAs within the TCNs that currently most closely match the needs of international competition cooperation.

When discussing this significant increase in the number and scope of operation of TCNs, it is difficult not to notice a snowball effect in the development of these networks. NCAs which have learned to operate in one transnational network can then engage more easily in subsequent network structures. As a result, the vast majority of NCAs now treat the transnational network environment as a natural sphere of activity, regardless of whether current domestic law fully permits such activity. The mechanism of cooperation within TCNs at many levels is self-perpetuating, going beyond mere cooperation of NCAs, as these bodies often perform other functions (eg, sector regulation or consumer protection).

Most TCNs are informational in nature and are based on informal agreements between member NCAs. At the same time, it can be seen that those TCNs which do develop tend to shift from purely informational activities to harmonisation activities by adopting soft law acts aimed at achieving *de facto* convergence and changing the administrative practice of NCAs, albeit without any formal revision of national laws. This transition to the administrative phase depends on the formalisation of the network. As a rule, administrative networks require a legal basis in hard law to enable participants to undertake formal cooperation and develop enhanced cooperation. For this reason, the European Competition Network (ECN) is characterised by the most far-reaching formalisation compared to other networks (eg, the International Competition Network (ICN), the Organisation for Economic Co-operation and Development (OECD) or the United Nations Conference on Trade and Development (UNCTAD)). This is because the ECN is an administrative network which, in addition to exchanging information between members, has developed mechanisms for the allocation of antitrust jurisdiction and for formal legal assistance.[4] At the same time, despite this formalisation, the basis for the ECN's operation remains predominantly soft law and statements of NCAs, which confirms that even European administrative networks remain partly deformalised (operationally).

At the same time, the comparative analysis reveals that the extent of available information on the activities of some TCNs varies significantly. The vast majority of TCNs provide a reasonably large amount of information (global networks and parts of continental networks); but some provide very little information, and sometimes even contradictory information (parts of continental networks and large parts of regional networks). In particular, this problem applies to networks whose activity is limited or has in fact fizzled out. While NCAs often boast about the creation of a new TCN, they never officially announce the end of its activities or the reasons for this.

4 J.P. Terhechte, *International Competition Enforcement Law*, p. 16.

This variability in the lifecycles of TCNs is a result of their flexible structure and the often informal arrangements that underpin their establishment and operation. Many NCAs take an instrumental approach to international cooperation and TCNs. As long as a TCN is justified, NCAs will invest resources in it; but if it no longer fulfils its functions, they will abandon it. Many factors can be identified that cause TCNs to cease their activities. The basic problem with transnational cooperation is often a question of funding. As many TCNs grow, smaller NCAs must allocate their resources accordingly, causing some networks to cease or limit their activities due to a lack of funding. One cannot help but notice that TCNs must compete for the resources that NCAs are willing to invest in international cooperation.[5] Sometimes there is a cannibalisation of networks, where one TCN takes over the work of another. European Competition Authorities (ECA) and the EU Merger Working Group (MWG) are good examples of this. Although the ECA's activity is currently limited to annual meetings of the heads of EU NCAs, at the same time the ECA's information system on multi-jurisdictional concentrations has been developed within the EU MWG (it even uses nomenclature referring to another network and talks about 'ECA forms' – and even 'ECA 2 forms' – which were not originally envisaged within the ECA cooperation, but were only created within the EU MWG). Another issue is that it is sometimes problematic to clearly define the output of many TCNs. It is difficult to identify any lasting achievements of the World Trade Organization, the Central European Competition Initiative or the Marchfeld Competition Forum; although there is no doubt that their added value – admittedly not very tangible – is in the form of the contacts established and the possible increase in mutual trust between members of these networks. Some networks die out without the political support that initially underpinned their establishment. As foreign policy priorities change, the directions of international cooperation of NCAs often change too. The example of the Polish NCA shows that sometimes a change in leadership may have a significant impact on the NCA's involvement in particular networks or in international network cooperation in general.

The cooperation of NCAs within TCNs has become a shining example of, and also an argument for, the legitimacy of distinguishing transnational forms of cooperation as an intermediate route between traditional forms of national and international cooperation. The cooperation of NCAs emerged as a response to the real needs of undertakings and agencies, and not as the implementation of an elaborated theoretical model. The globalisation of the economy and the proliferation of competition regimes worldwide have turned competition law into an obstacle to the development of international trade, rather than an instrument of economic liberalisation.[6] For some time, it seemed that the answer might be an international antitrust code adopted in the form of a multilateral international agreement entrusting jurisdiction to a selected international organisation. However, although protection of competition is in the national interests of states,[7] other national interest considerations have

5 I. Maher, A. Papadopoulos, 'Competition Agency Networks', p. 85.
6 R.W. Damtoft, R. Flanagan, 'The Development of International Networks', p. 137.
7 K. Unoki, *Competition Laws, National Interests and International Relations*, London, Routledge, 2020, p. 120.

prevented them from concluding such an international agreement. The last unsuccessful US initiative to conclude such an agreement is the most visible proof of this.[8] However, the reluctance of states to give up their jurisdictional sovereignty in competition matters has led to the development of voluntary cooperation between NCAs (rather than states), resulting in a gradual convergence of law and/or administrative practice and the creation of more or less formal network links. Given the impossibility of adopting international competition rules and establishing an international organisation to enforce them, along with the need to develop and strengthen international cooperation in competition matters, the emergence and development of TCNs became the answer.[9]

The development of TCNs is inextricably linked to the development of competition law and the intensification of international cooperation of NCAs. There is no denying that these processes have been mutual catalysts for each other. While in the early 1990s, few countries had competition laws, the accession of more countries to TCNs resulted in more and more countries adopting competition legislation. Once these laws had been passed and members of TCNs had grown to know each other, NCAs were able to develop international cooperation. The various stages of evolution may have arisen in a different order in specific cases. The most significant in this respect is the 'network effect': as more and more countries cooperated, enacted competition legislation and participated in TCNs, more jurisdictions began to follow this path of development. This phenomenon was also facilitated by the specific features of competition law. Competition law is not usually particularly politically charged. It is based on universal economic concepts that, while potentially contentious, can be detached from the local context and naturally woven into the debate of NCAs. The end result is transnational guidelines and best practices that have significantly changed national and transnational competition rules. In this context, it is emphasised that intensive international cooperation and the functioning of NCAs within TCNs have led to the emergence of 'cognitive convergence'.[10] This in turn has developed into the convergence of administrative practice and, ultimately, the harmonisation of rules. This currently seems to be the only achievable effect of TCNs. The previous chapter showed that there is no prospect of one single formal international competition treaty, leaving TCNs as the main forum for international engagement on competition matters for NCAs.[11]

The impact of TCNs on competition law is noticeable and important, and manifests itself primarily in the exercise of competition jurisdiction by NCAs. Indeed, TCNs are a form of institutionalised transnational interaction between NCAs, the primary purpose of which is to enable members to deal with cases that

8 Discussed in detail in Section 3.4.8 on the ICN.

9 Similarly, S. Van Uytsel, 'The International Competition Network, Its Leniency Best Practice and Legitimacy. An Argument for Introducing a Review System', in M. Fenwick, S. Van Uytsel, S. Wrbka (eds), *Networked Governance*, p. 186.

10 D.K. Tarullo, 'Norms and Institutions in Global Competition Policy', *AJIL*, vol. 94, iss. 3, 2000, pp. 479–495.

11 I. Maher, 'The Networked (Agency) Regulation of Competition', in P. Drahos (ed), *Regulatory Theory. Foundations and Applications*, Canberra, ANU Press, 2017, p. 704.

fall within their jurisdiction. The influence of TCNs is evident at every stage of the handling of competition cases. On the initiation of proceedings, TCN members have many informational and administrative obligations. Some of these obligations derive from hard law, as in the case of the ECN; while others are soft obligations, as in the case of the ECA, the OECD and the ICN. Moreover, even at the stage of initiating proceedings, competition jurisdiction may be allocated and the original international jurisdiction of the NCAs within the TCN may be modified. Moreover, a case that is pending before one NCA may serve as the basis for suspending or discontinuing proceedings in another jurisdiction that is also a member of the TCN. At the next stage, cooperation within the network allows for mutual assistance in gathering evidence, establishing facts or determining the legal status of the pending case.

Particular importance is given to the coordination of procedural steps, which should lead to an administrative outcome that is consistent among members of the TCN. Importantly, formalised networks such as the ECN directly influence administrative decisions, as members need to agree on them or face losing the competence to resolve the case as a result of it being taken over by another authority (ie, in this case, the European Commission). The analysis conducted reveals that cooperation within TCNs does not end with the resolution of the case, but may also concern the implementation of decisions taken, in both voluntary and compulsory forms. At the same time, the possibilities indicated here merely illustrate the potential for transnational cooperation within the framework of a TCN; its actual implementation depends to a large extent on the will of the NCAs (apart from situations in which these obligations are of an absolute nature and result from the provisions of EU law). New ideas for enhanced cooperation among NCAs within TCNs have also been identified and studied. The implementation of at least some of these would further strengthen the non-organisational legal ties that connect network members. The proposed ideas for enhanced cooperation include the extension of network ties to other entities, such as courts and even parliaments. This shows, on the one hand, the potential afforded by transnational network structures; and on the other hand, the need for a holistic response to the challenges associated with resolving transnational competition cases and controlling the NCAs that handle them.

The observed development of international cooperation of NCAs does not mean that the transnational implementation of competition rules does not have weaknesses that could threaten its effectiveness. The limitations and deficits in the international implementation of competition policy have three main causes. First, there is no institutional framework that obliges real cooperation in all matters that require it. Second, real and full cooperation involves difficult policy choices in some situations, and expertise and experience alone cannot substitute for this. Third, there is no universal agreement on the objectives of international cooperation between NCAs in all sectors of the economy.[12] Furthermore, TCNs are

12 P.B. Stephan, 'The Problem with Cooperation', in A.T. Guzman (ed), *Cooperation, Comity, and Competition Policy*, p. 218.

effective as long as NCAs wish to cooperate and no conflicts arise. TCNs do not offer effective conflict resolution mechanisms. Member NCAs may be suspended or expelled, but this seldom resolves the problem. Moreover, TCNs may become another arena in the power struggle between large jurisdictions. Especially younger NCAs should remember that although competition enforcement may be regarded as an expert task, the actual choices made are seldom politically neutral. These risks and vulnerabilities are real, and their resolution may require decisions at the level of national governments and international organisations. However, it seems that the significance of the identified threats in practice manifests itself relatively rarely and concerns matters of exceptional economic and political importance. On the other hand, from the point of view of the day-to-day work of NCAs, the failure to solve the identified problems does not significantly affect the exercise of their jurisdiction and the conduct of international activities.

The analysis has shown that NCAs can cooperate with each other through many forms and that new areas of cooperation are continually under discussion. Many of the forms of this cooperation can operate and develop independently – for example, on a bilateral basis. However, TCNs play a key role in the development and intensification of this cooperation. They eliminate the need for bilateral arrangements, allowing NCAs to become immediately involved in multilateral and often universal international cooperation. The development of this cooperation typically follows a similar sequence. The first stage is mutual acquaintance between NCA functionaries and officials, which evolves into soft cooperation. Forms of cooperation involving joint reports and research are then developed to arrive at best practices and guidelines. By establishing the principles of interaction, it is possible to move on to administrative cooperation. Very often, this is less formal and does not affect the rights and obligations of third parties. However, if hard law rules are enacted, the interaction may become more advanced and affect the exercise of competition jurisdiction, and even the allocation of cases. Various forms of cooperation development within the TCN are not closed stages, but constantly co-evolve depending on the needs of network members. For example, conferences and seminars provide for the ongoing flow of new information and inspire change. The development of administrative cooperation may, in turn, reveal the need for changes or the adoption of new soft law documents. The ideas for 'enhanced international cooperation' are evidence of this development. It is somewhat paradoxical that some of these – not long ago considered as postulates – have already materialised in the form of the ECN+ Directive. This confirms the potential afforded by the interaction of NCAs within TCNs and demonstrates the willingness of national and transnational competition authorities to strengthen this cooperation.

At the end of these final considerations, it is worth pointing out one more important – though often poorly understood – source of successful international cooperation among NCAs. The success of cooperation, especially through a TCN, depends on the people. The human factor will determine the fate of a network, regardless of whether it is global, continental or regional. Mutual respect, trust and openness are among the basic conditions for effective cooperation between

authorities and institutions, and are crucial to the success of a given network.[13] Although this may seem like a truism, without well-developed relations between the officers of the NCAs involved in international cooperation, a TCN will not develop so well. International cooperation between NCAs is largely deformalised, as TCNs often operate without a physical dimension, not to mention a secretariat or other permanent structure. They would not have developed to the degree they have today without commitment based on reciprocal respect and trust between the staff of NCAs responsible for working together.

Last but not least, it may seem somewhat strange to publish a book on cooperation in times of war and global pandemics. However, I believe that this is precisely the most appropriate moment for such an endeavour. Cooperation is needed more than ever at times such as this, to prove that mutual confidence and reliance are necessary and beneficial to all. Extraordinary measures undertaken during the COVID-19 pandemic and the revival of long-forgotten horrors of war in Europe will surely change the world as we knew it; but in order to overcome what Carl Schmitt calls the 'state of exception' and return to normality anew, international cooperation based on mutual trust will be crucial. Although cooperation in competition matters may not rank among the highest priorities for many governments at the time of writing, it will be critical in securing a smooth transition and ensuring the prompt elimination of anti-competitive behaviours or mergers that may have seemed justified under the prior and current extraordinary circumstances.

13 B. Hawk, J. Beyer, 'Lessons to Be Drawn from the Infra-National Network of Competition Authorities in the US. The National Association of Attorneys General (NAAG) as a Case Study', in C.-D. Ehlermann, I. Atanasiu (eds), *European Competition Law Annual 2002,* p. 110.

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