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Due Process: The Exchange of Information and Risk of Hindering Effective Cross-border Co-operation in Competition Cases

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The paper investigates the different regimes for the exchange of information in cross-border competition cases. It argues that the co-operation and information exchange mechanisms in competition cases established by Regulation 1/2003 have been overtaken by the means provided by the European Evidence Warrant which was developed under the former third Pillar (Co-operation in Criminal Matters). Moreover, the paper argues that both means: those provided by Regulation 1/2003 and those provided by the European Evidence Warrant are in general available to national competition authorities. In the light of the merging of the first pillar and third pillar under the Lisbon Treaty possible solutions are put forward to address the inconsistencies created by the availability of different co-operation mechanisms.

1. INTRODUCTION

The paper considers the EU cross border co-operation among competition authorities in competition cases and in particular in cases involving criminal sanctions for individuals. First, a general hypothesis is set out, followed by an introduction into the means of co-operation provided by Regulation 1/2003 and the European Evidence Warrant (EEW).[1] The paper, then, turns to the question, which means would be available to a national competition authority faced with a cross-border cartel investigation? It is shown that the national competition authority could in general use (i) co-operation within the European Competition Network (ECN), i.e. the means provided by Regulation 1/2003 and (ii) the EEW in order to obtain information.[2] The paper, then, turns to an investigation of the forms of co-operation under Regulation 1/2003 and the EEW, i.e. the scope of application of the two regimes, before the limits of co-operation will be explored. Concerning the limits set by Regulation 1/2003 and the EEW the paper will, in particular, focus on the question of dual criminality[3] as a limitation to the usage or the exchange of information. The following interim conclusions explain that one could argue that the mechanisms developed in the context of the co-operation in criminal cases seem to go further than those in the ECN and that the interaction of Regulation 1/2003 and the EEW might lead to cases where

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1 Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ 2008, L350/72.

2 Information in this sense should be understood broadly and covers also classical evidence.

3 Also called double criminality.

limitations are circumvented. The last section suggests possible solutions in order to harmonise the different regimes. Against the background of the merging of the EU pillars under the Lisbon Treaty this harmonisation might lead to more effective cross-border co-operation. The paper is intended to show the divergences in the current legal instruments regarding the exchange of information and should encourage a debate about the appropriate means of co-operation in competition law but equally in law enforcement in general. However, there seems to be a caveat concerning the EEW: the framework decision has not been implemented yet (the deadline for implementation is January 2011) so that the actual implementation in praxis has to be seen.

2. STARTING POINT/GENERAL HYPOTHESIS

The starting point should be a widely accepted hypothesis: the legal protection regarding due process in competition cases involving (criminal) sanctions against individuals[4] is higher than the protection given to undertakings in (classical) competition proceedings. This in turn would mean that one could also formulate a second hypothesis which seems to be fundamental to this paper: the use of information gathered in proceedings against individuals can be used in classical competition proceedings against undertakings. This forms the basis for this analysis which compares the exchange of information in competition cases to cases of exchange of information in criminal cases against individuals. The argument that can be made after this comparison is that the aim to protect the individual in competition cases has lead to a situation where the effectiveness of co-operation in cross-border competition cases in the European Competition Network (ECN) is reduced i.e. is not as effective as it could be. This is so since the protection of the individual in competition cases goes much further than in cases involving sanctions against individuals in general.[5] The paper is, therefore, intended to start a debate about the appropriate balance between the protection of individuals and effective cross-border co-operation.

The analysis starts with a simple practical problem. A national competition authority in a Member State (MS) with criminal sanctions against individuals for the infringement of competition law, for example the OFT, investigates a cartel. This cartel was formed in another MS - that does not have a cartel offence - and is, however, directed and implemented at the UK market. How can the OFT receive or request the information that the competition authority in the other MS holds or could acquire?

In general two ways might be possible: (i) The classical route under Article 22[6] and Article 12[7] of Regulation 1/2003 which covers the exchange of information within the European Competition Network, and (ii) the EEW. Before the paper turns to the

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4 In the context of this paper 'criminal sanctions' should be understood as encompassing sanctions which are imposed on an individual, independently from the national characterisation as criminal or administrative sanctions.

5 Such cases encompass sanctions imposed by means of criminal and administrative procedures.

6 Concerning investigation on behalf of another authority.

7 On the exchange of information.

availability and scope of the means in a competition case, it seems useful to recall the general framework of these tools.

3. CO-OPERATION UNDER REGULATION 1/2003

The co-operation within the ECN in its current form was established with the introduction of Regulation 1/2003. The ECN is formed out of the Commission and the National Competition Authorities (NCAs).[8] With regard to the co-operation within the ECN one can distinguish between vertical and horizontal co-operation.[9] While there are special mechanisms established for the vertical exchange of information between the Commission and the National Competition Agency in Article 11 of Regulation 1/2003[10] the horizontal exchange, i.e. the co-operation among the different NCA, is governed by Article 12.[11] Vertical co-operation does not take place on a voluntary base, as Article 11 of Regulation 1/2003 imposes clear rights and obligations regarding the exchange of information. In contrast, horizontal co-operation among NCAs under Article 12 of Regulation 1/2003 does not impose an obligation to exchange information but seems to leave discretion.[12]

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[8] On the development of the ECN in general see DJ Gerber, 'The Evolution of a European Competition Law Network' in C Ehlermann and I Atanasiu (eds), *Constructing the EU Network of Competition Authorities*, Oxford, Hart, 2004. For an evaluation of functioning of the ECN see: M Kekelekis, 'The European Competition Network (ECN): It Does Actually Work Well' (2009) EIPAScope 35 and with regard to leniency K Dekeyser and M Jaspers, 'A New Era of ECN Cooperation: Achievements and Challenges with Special Focus on Work in the Leniency Field' (2007) 30 *World Competition* 3. The Network seems to be designed with distinct hierarchical structure, on this unusual structure of a network see: F Cengiz, 'The European Competition Network: Structure, Management and Initial Experiences of Policy Enforcement' (2009) <http://cadmus.eui.eu/dspace/handle/1814/11067> accessed 29 March 2010. In the US one might equally identify such a Network of Competition Authorities, as the Multistate Antitrust Taskforce within the National Association of Attorneys General is used as an 'ad hoc antitrust enforcement unit' in antitrust cases, B Hawk and 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 Ehlermann and I Atanasiu (eds), *Constructing the EU Network of Competition Authorities*, Oxford, Hart, 2004, 100.

[9] D Reichelt, 'To What Extent does the Co-operation within the European Competition Network Protect the Rights of Undertakings?' (2005) 42 CMLR 745, 748.

[10] The Commission seems to suggest that the main purpose of the provision is to 'ensure that cases are dealt with by a well placed competition authority … [and that] ... efficient and quick re-allocation of cases [is possible]', Commission Notice on Cooperation within the Network of Competition Authorities, OJ 2004, C101/43, para 16-17. Moreover, the provisions should safeguard the consistent application of Article 101 and 102 throughout the Union, ibid, para 43-57.

[11] SM Lage and H Brokelmann, 'The Possible Consequences of a Relatively Broad Scope for Exchange of Confidential Information on National Procedural Law and Antitrust Sanctions' in C Ehlermann and I Atanasiu (eds), *Constructing the EU Network of Competition Authorities*, Oxford, Hart, 2004, 406. Article 12 seems to be the general basis for the exchange of information while Article 11 seems to cover the more specific case of vertical co-operation. On the exchange of information in the US see B. Hawk and J. Beyer, n 8, above, 107–110, or in the Federal system in Germany U Böge, 'The Bundeskartellamt and the Competition Authorities of the German Länder' in C Ehlermann and I Atanasiu (eds), *Constructing the EU Network of Competition Authorities*, Oxford, Hart, 2004.

[12] K Dekeyser and F Polverino, 'The ECN and the Model Leniency Programme' in I Lianos and I Kokkoris (eds), *The Reform of EC Competition Law: New Challenges*, Alphen aan den Rijn, Kluwer Law International, 2010, 508–509. On the contrary view see J Faull and A Nikpay, *The EC Law of Competition*, 2nd ed, Oxford, Oxford

The European Evidence Warrant, on the other hand, is an instrument which was adopted under the former third pillar of the EU, i.e. co-operation in criminal matters.[13] Within the current system of co-operation in criminal matters one has to differentiate between measures based on the principle of mutual assistance which include the Council of Europe Convention on mutual assistance in criminal matters, the Schengen Agreement and the EU Convention on mutual assistance in criminal matters and its Protocol and those measures that are based on mutual recognition. While the idea of mutual recognition for the area of co-operation in criminal matters was promoted at the European Council meeting in Tampere in 1999.[14] The Commission released a communication on mutual recognition that was followed by Council programme containing 24 measures.[15] The first step to implement the principle of mutual recognition was the framework decision on the European Arrest Warrant[16] which was followed by the framework decision on freezing of assets and evidence,[17] the framework decision on the application of the principle of mutual recognition to financial penalties[18] and most notably the framework decision on the European Evidence Warrant.[19] In general, the difference between the principle of mutual recognition and the instruments based on mutual assistance can be explained by the degree of (legal) bindingness. In the case of mutual recognition the request by one MS to the other will be directly recognised and enforced by the other MS. Therefore, the request becomes an 'order – and not requests like in the case of mutual assistance

University Press, 2007, para 2.164-2.165, arguing that the duty of loyal cooperation (Article 3a TEU) would introduce a duty of co-operation. See also M Böse, *Der Grundsatz der Verfügbarkeit von Informationen in der strafrechtlichen Zusammenarbeit der Europäischen Union*, Göttingen, V & R Unipress, 2007, 51ff, with regard to the question why an exchange of evidence might face constitutional problems.

13 Such co-operation in criminal matters among the EU's MSs was firstly developed outside the EU system within the Council of Europe. This co-operation dates back to 1959 with the Council of Europe Convention on mutual assistance and its subsequent protocols. In terms of co-operation within the EU framework one could mention the Schengen Convention, OJ 2000, L239/19, and the EU Mutual Assistance Convention, OJ 2000, C197/1, which was signed after long negotiations and supplemented the Schengen and Council of Europe rules.

14 European Council of 15-16 October 1999, Conclusions of the Presidency - SN 200/1/99 REV 1.

15 Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, OJ 2001, C12/02.

16 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ 2002, L190/1, transposition in Member States' national legislation until 1 January 2004.

17 Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, OJ 2003, L196/45; the aim is to enable judicial authorities of one MS to send an order to another MS to freeze assets in order to obtain evidence or to confiscate the property in the future. This order is executed by the other MS quickly and without further formality. The scope of this instrument is, however, limited to the freezing of evidence located in another MS. The subsequent transfer of the evidence between the MSs would be regulated by mutual assistance instruments or the EEW. This framework decision was supplemented by the framework decision on the application of the principle of mutual recognition to confiscation orders, OJ 2006, L328/59.

18 Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, OJ 2005, L76/16.

19 See above, n 1.

principle – that will have legal binding force upon the country receiving it. Thus, the requesting country becomes an issuing country and the requested country becomes an executing country.'[20] The mutual assistance instruments do not bind in this direct form[21] and are subject to dual criminality requirements.

In practice this means that in cases of mutual assistance a request is sent from one MS to the other MS. This request shall then, if no relevant ground for refusal is invoked by the receiving MS, be executed as soon as possible and where possible within the deadlines indicated by the issuing authority. In cases of mutual recognition, the ordering state typically issues an order on a standard form that shall be recognised and executed within a fixed deadline. It has to be observed that in these cases the relevant grounds for refusal are limited and the requirement of the dual criminality has been 'watered down' over time dramatically. Ideally there would be no dual criminality requirement at all, where the principle of mutual recognition applies.[22] In this sense the EEW might be seen as the first and most courageous step towards this goal.[23]

4. AVAILABILITY OF INSTRUMENTS

After this brief introduction into the two different instruments, we should return to our example of a cross-border competition case. The OFT would, first of all, need to assess whether both instruments would be available in the given case. As it seems clear that competition authorities can use the means provided for by Article 12 and 22 of Regulation 1/2003, a closer look at the question whether the competition authorities could use the mechanism provided in the framework decision on the EEW seems necessary.

In this respect it has first to be born in mind that the EEW is only available in cases of 'criminal proceedings'. However, Article 5 of the framework decision defines these criminal proceedings not only as classical criminal proceedings but as proceedings in

[20] V Stojanovski, 'The European Evidence Warrant' Dny práva – 2009 – Days of Law: the Conference Proceedings, 1. edition, Brno, Masaryk University, 2009, 1.2.

[21] The Council of Europe Convention for example is legally not binding, as Article 2 states that the request may be refused on grounds of sovereignty, security, order public and essential interest. However, as every Country is free to define its own essential interest the country is essentially 'free to decide on how to proceed with the request... [and seems to depend] solely on the will of the requesting country', ibid, 1.1. Even though, the protocol from 2001 seems to ease this problem to some extent.

[22] See in this regard for example the Proposal for a Council framework decision on the exchange of information under the principle of availability (Brussels 12.10.2005) COM/2005/490 final.

[23] See in this regard for example recital 16 of the Framework Decision on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters: 'To ensure the effectiveness of judicial cooperation in criminal matters, the possibility of refusing to recognise or execute the EEW, as well as the grounds for postponing its execution, should be limited. In particular, refusal to execute the EEW on the grounds that the act on which it is based does not constitute an offence under the national law of the executing State (dual criminality) should not be possible' if the request does not require search and seizure. Even in these cases Article 14 contains a long list of offences that are not subject to the dual criminality requirement.

which a legal person is held liable or is punished for the infringement of the rules of law, as it encompasses:

> (a) ... criminal proceedings brought by, or to be brought before, a judicial authority in respect of a criminal offence under the national law of the issuing State;
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> (b) ... proceedings brought by administrative authorities in respect of acts which are punishable under the national law of the issuing State by virtue of being infringements of the rules of law, and where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters;
>
> (c) ... proceedings brought by judicial authorities in respect of acts which are punishable under the national law of the issuing State by virtue of being infringements of the rules of law, and where the decision may give rise to further proceedings before a court having jurisdiction in particular in criminal matters; and
>
> (d) ... proceedings referred to in points (a), (b) and (c) which relate to offences or infringements for which a legal person may be held liable or punished in the issuing State.[24]

So that the EEW is also available in cases of administrative sanctions[25] which is clarified by Article 5(b) of the framework decision.[26] In this respect it might also be important to note that the framework decision is not limited to sanctions against individuals but applies to sanctions against 'a legal person.'[27] One might, thus, consider that the EEW is also available in classical competition cases, i.e. cases where sanctions against individuals are not at issue. Such an interpretation might equally find some support in the idea that the sanctions against the undertakings in competition cases are criminal in nature, at least in the sense of the ECHR.[28]

With regard to the question whether a competition authority, i.e. the OFT, could issue an EEW, Article 2 of the framework decision explains that an EEW can be issued by:

(i) a judge, a court, an investigating magistrate, a public prosecutor; or

(ii) any other judicial authority as defined by the issuing State and, in the specific case, acting in its capacity as an investigating authority in criminal proceedings with

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[24] Framework decision on the EEW, n 1, above, Article 5.

[25] So in cases like § 81 of the (German) GWB which imposes administrative sanctions (Ordnungswidrigkeit) for the breach of competition law.

[26] See in this regard also H. Ahlbrecht, 'Der Rahmenbeschluss-Entwurf der Europäischen Beweisanordnung - eine kritische Bestandsaufnahme' (2006) *Neue Zeitschrift für Strafrecht* 70, 71.

[27] Framework decision on the EEW, n 1, above, Article 5(d).

[28] See in this regard: PJ Wils Wouter, 'La Compatibilité des Procedures Communautaires en Matière de Concurrence avec la Convention Européenne des Droits de l'Homme: Wils, La Compatibilité des Procedures Communautaires en Matière de Concurrence avec la Convention Européenne des Droits de l'Homme, Cahiers de Droit Europeen, (1996) 32 *Cahiers de Droit Europeen* 329; A. Andreangeli, *EU Competition Enforcement and Human Rights*, Cheltenham, Edward Elgar, 2008, 29ff.

> competence to order the obtaining of evidence in cross-border cases in accordance with national law.

Thus, a competition authority even though not 'a judge, a court, an investigating magistrate, a public prosecutor' within the meaning of Article 2(c)(i) of the framework decision could issue an EEW. This is so since it is acting in the 'capacity as investigating authority' and 'has the competence to order the obtaining of evidence in cross-border cases in accordance with national law'[29] within the meaning of Article 2(c)(ii) of the framework decision. This finding is, moreover, supported by the fact that the internal organisation of the MS, i.e. whether the MS has put an administrative authority or a court in charge of the investigation, cannot be decisive with regard to the question of whether the EEW is applicable.[30]

Hence, it has been established that the investigating competition authority, in cases where criminal sanctions for individuals exist, has both means available, the means of Regulation 1/2003 and the EEW. One might, moreover, take up the position that this does not only apply in cases involving criminal sanctions against individuals, but equally in classical competition cases without criminal sanctions against individuals.

5. FORMS OF CO-OPERATION UNDER REGULATION 1/2003 AND THE EEW (SCOPE OF APPLICATION)

Another question which a national competition authority would have to face is the question, what kind of information it can obtain under the different regimes and how the procedures would work.

If a national competition authority, like the OFT, would use the means provided by Regulation 1/2003, Article 22 and Article 12 of Regulation 1/2003 would come into play. According to Article 22:

> The competition authority of a Member State may in its own territory carry out any inspection or other fact-finding measure under its national law on behalf and for the account of the competition authority of another Member State in order to establish whether there has been an infringement of Article 81 or Article 82 of the Treaty. Any exchange and use of the information collected shall be carried out in accordance with Article 12.

So that under Regulation 1/2003 the requesting competition authority could ask the competition authority in the other MS to investigate on its behalf. In this investigation the competition authority could use all the powers granted to it in such matters. The exchange of the acquired information would, however, be subject to Article 12 of Regulation 1/2003. Regulation 1/2003 does not cover further procedural questions.

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[29] In this respect one has to bear the general competence of the national competition authorities to obtain evidence in cross-border competition cases in mind.

[30] Such a requirement would put pressure on the national procedural autonomy to change the system towards a system with courts in charge of the investigation and might be seen as an intrusion into the national procedural autonomy.

In the case of the EEW, however, one has to point out that the EEW seems not to cover such a broad scope of measures as Article 22 of Regulation 1/2003.[31] Article 4(1) of the framework decision explains that an EEW can be issued to obtain objects, documents or data. However:

> [t]he EEW shall not be issued for the purpose of requiring the executing authority to:
>
> (a) conduct interviews, take statements or initiate other types of hearings involving suspects, witnesses, experts or any other party;
>
> (b) carry out bodily examinations or obtain bodily material or biometric data directly from the body of any person, including DNA samples or fingerprints;
>
> (c) obtain information in real time such as through the interception of communications, covert surveillance or monitoring of bank accounts;
>
> (d) conduct analysis of existing objects, documents or data; and
>
> (e) obtain communications data retained by providers of a publicly available electronic communications service or a public communications network.[32]

Hence, the scope of application for the EEW seems to be more limited. Yet, this narrow scope is widened again by Article 4(4) as the EEW covers such information if it is was, 'already in the possession of the executing authority before the EEW is issued'.[33] Moreover, it is important to note that the EEW also covers statements made during the execution of the warrant, for example during a search and seizure.[34] From a procedural point of view, the EEW is issued on a standard form and strict deadlines for its execution or refusal of execution apply.[35]

Finally, another difference between the mechanisms provided by Regulation 1/2003 and the EEW regarding the scope of application has to be pointed out. The co-operation under Regulation 1/2003 does only apply among the national competition authorities/national competition authorities and the Commission, while the EEW cannot only be used among competition authorities. The EEW can be directed to every 'authority having competence under the national law which implements this Framework Decision to recognise or execute an EEW in accordance with this Framework Decision.'[36]

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[31] Depending on the particular national arrangements regarding the powers of investigation of the competition authorities.

[32] Framework decision on the EEW, n 1, above, Article 4(3).

[33] Ibid, Article 4(4).

[34] Ibid, Article 4(6).

[35] Ibid, see Article 15 and 16.

[36] Ibid, Article 2(d).

6. LIMITS OF CO-OPERATION

Another important (and perhaps the most important) consideration for the competition authority, e.g. the OFT, are the limits set for the co-operation. In this context first the limits imposed by Regulation 1/2003 should be investigated before the limits of the EEW will be examined.

6.1. Regulation 1/2003

The co-operation might be restricted in three different ways: (i) restrictions with regard to the gathering of information, (ii) restrictions with regard to the exchange of information, and, finally, (iii) restrictions with regard to the use of the exchanged information.[37]

6.1.1. Limits with regard to the gathering of information

With regard to the question of gathering information, the Commission holds the view that these questions are governed by the national law that is applicable to the national authority that is gathering the information.[38] Hence, Regulation 1/2003 upholds the national procedural autonomy and in consequence the national authority 'may inform the receiving authority whether the gathering of the information was contested or could still be contested'.[39]

From a Community perspective this means that the Regulation seems to impose no limitation on the exchange of information that might have been gathered in violation of national procedural law. One might describe this as a form of a country of origin principle comparable to the developments in the four freedoms.[40] This would mean that the question whether the information was required legally would depend solely on the law applicable to the transmitting state. The law of the receiving state would, on the other hand, determine the consequences in the national proceedings if the information had been gathered in an illegal manner in the providing state.[41] It is suggested that this approach, though it might raise questions regarding the rule of law and the protection of the undertaking concerned, is in line with the principle of national procedural autonomy.

6.1.2. Limits with regard to the exchange of information

The exchange of information seems not to be limited by Article 12 of Regulation 1/2003. This seems also supported by the provision governing questions of professional secrecy, Article 28 of Regulation 1/2003. This provision explicitly sets out

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[37] D Reichelt, n 9, above, 750. With regard to the relationship between human rights and the exchange of information under Article 12 in general see: A. Andreangeli, n 28, above, 199–219.

[38] Cooperation Notice, n 10, above, para 27.

[39] Ibid.

[40] For a critical comment on this approach see D Reichelt, n 9, above, 751–752, making an argument based on the rule of law.

[41] *Cf.* Cooperation Notice, n 10, above, para 27.

that the restrictions imposed by this Article are '[w]ithout prejudice to the exchange... of information'.[42]

The interpretation that the exchange of information under Article 12 is not limited has been criticised, as Article 12 would set out the legal basis of the exchange of information while the other provisions (Article 11, 13 and 21) would set out the conditions for the exchange. This is said to be so since the exchange would, otherwise, not be limited at all as the only limitation would stem from the requirement that it must be used for 'the purpose of applying Article [101] or Article [102]' as Article 12(2) sets out.[43]

However, the fundamental difference between Article 11 and 12 is that the former is covering mainly the horizontal while the later is covering mainly vertical matters.[44] Hence, it seems not easily possible to apply limitations that are designed to apply in horizontal cases to vertical cases and vice versa. Moreover, as mentioned above, one should carefully distinguish between the gathering, exchange and usage of information. So that the limitation for 'the purpose of applying Article 81 or Article 82' is not a limitation with regard to the exchange but with regard to the usage of information.[45]

Thus, the Regulation does not limit the exchange of information itself. The only limitation on the exchange might stem from the fact that the Regulation must comply with the general principles of EU law.[46] This, however, could be achieved by national procedural means such as hearings and formal appealable decision before the NCA passes on the information.[47]

Yet, one might question whether such a severe measure as not exchanging information is needed to secure the protection of fundamental rights. It might be better to handle issues regarding the usage, including questions of access to documents of third parties, not at the stage of exchange but, more appropriately, at the level of regulating the usage of the information itself. Finally, one has to bear in mind that an interpretation that would prescribe procedural safeguards would invade the national procedural autonomy. Therefore, it seems that limiting the possible exchange of information provided for by Article 12 of Regulation 1/2003 by means of applying the limitations of Article 11 or

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42 Article 28(2).

43 D Reichelt, n 9, above, 755.

44 The distinguishing element seems to be the hierarchical structure of the network. While there are compulsory elements in the horizontal relationship such elements are not present in the vertical relationship. See in this regard also SM Lage and H Brokelmann, n 11, above, 406.

45 For a contrary view see D Reichelt, n 10, above, 755, who seems to interpret this as a limitation of exchange.

46 SM Lage and H Brokelmann, n 11, above, 412.

47 Ibid, 412–415. Very critical with regard to the question of how information that is considered confidential in one MS can be exchanged with another MS that does not consider this as confidential (client lawyer privilege or the access to files) also D Waelbroeck, "Twelve Feet All Dangling Down and Six Necks Exceeding Long': The EU Network of Competition Authorities and the European Convention on Human Rights and Fundamental Freedoms' in C Ehlermann and I Atanasiu (eds), *Constructing the EU Network of Competition Authorities*, Oxford, Hart, 2004, 447–478.

by requiring other procedural safeguards at national level seems difficult. So that the exchange of information is prima facie not limited by Article 12 but left at the discretion of the national authorities.[48] However, this does not mean that the *use* of this information is not limited by Article 12.

6.1.3. Limits with regard to the use of information

With regard to the use of information exchanged Article 12(1) explains that:

> For the purpose of applying Articles 81 and 82 of the Treaty the Commission and the competition authorities of the Member States shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information.

At first glance this seems to be at odds with *Spanish Banks,* since the ECJ held with regard to the exchange of information that a NCA could not rely on information covered by professional secrecy.[49] However, the Courts reason for this interpretation was that the old 'Regulation No 17/62 does not govern proceedings conducted by the competent authorities in the Member States, even where such proceedings are for the implementation of Articles [101(1) and 106 TFEU]'.[50] Thus, the usage outside the Commission proceedings was not allowed, as the old Regulation only allowed the use of information for the purpose for which it was collected.[51] Hence, Article 12 of Regulation 1/2003 might be seen as a reaction to *Spanish Banks,* as it now expressly allows the usage and exchange of information between the Commission and the NCA and among the NCAs.[52] One can, therefore, conclude that except for the cases covered by Article 12(2) and (3), the information exchanged can be used. This, however, means that even evidence that could not have been collected under the national law but has been collected legally in another jurisdiction can be used, effectively leading to a situation where the 'less protective' standard prevails.[53]

However, the Regulation also provides for restrictions of the usage of the information exchanged. Article 12(2) of Regulation 1/2003 restricts the usage to 'the purpose of

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[48] Though one might have to make an exception based on the SEP provisio, established in Case C-36/92 *Samenwerkende Elektriciteits-Produktiebedrijven (SEP) NV* v *Commission* [1994] ECR I-1911, where the NCA is directly or indirectly engaged in economic activity see: D Reichelt, n 9, above, 770–774.

[49] Case C-67/91 *Dirección General de Defensa de la Competencia* v *Asociación Española de Banca Privada and others (Spanish Banks)* [1992] ECR I-4785, para 39 -42.

[50] Ibid, para 33.

[51] Ibid.

[52] *Cf.* M Woude, 'Exchange of Information Within the European Competition Network: Scope and Limits' in C Ehlermann and I Atanasiu (eds), *Constructing the EU Network of Competition Authorities*, Oxford, Hart, 2004, 381.

[53] In this regard see also A Andreangeli, 'The Protection of Legal Professional Privilege in EU Law and the Impact of the Rules on the Exchange of Information within the European Competition Network on the Secrecy of Communications between Lawyer and Client: One Step Forward, Two Steps Back?' (2005) 2 *Competition Law Review* 32, who describes the exchange and usage of information in the ECN as 'a significant threat to the confidentiality of lawyer-client communications', ibid, 43.

applying Article [101] or Article [102] of the Treaty and *in respect of the subject-matter* for which it was collected by the transmitting authority' (emphasis added). Therefore, Article 12 is more restrictive than the old Article which was not restricted to 'the subject-matter for which it was collected by the transmitting authority.'[54] This restriction, nonetheless, is not applicable if national competition law is applied in parallel and the outcome does not differ.[55]

Hence, the most important restrictions regarding the usage of information exchanged are contained in Article 12(3) of Regulation 1/2003. Article 12(3) limits the use of information as evidence in criminal cases against individuals to cases where:

- the law of the transmitting authority foresees sanctions of a similar kind in relation to an infringement of Article 101 or Article 102 of the Treaty or, in the absence thereof,
- the information has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority. However, in this case, the information exchanged cannot be used by the receiving authority to impose custodial sanctions.

According to the Commission this provision should ensure that the 'more extensive rights of defence'[56] of individuals are not circumvented by using the information exchanged under Article 12 which was collected from undertakings.[57]

It is important to bear in mind that the third paragraph of Article 12 covers two situations that need to be differentiated. Firstly, cases where both States impose criminal 'sanctions of a similar kind'[58] and, secondly, cases where only one MS imposes criminal sanctions, or where the criminal sanctions are not of similar kind.[59]

With regard to cases where both states impose similar criminal sanctions, the information can be used in the criminal case without any limitations by Article 12. This has been criticized as the procedural safeguards in the different MSs are not necessarily the same.[60] Moreover, one would have to bear in mind that this information might have been collected by the transmitting authority under the administrative procedures for the collection of information and not under the criminal procedures. So that it seems a bold statement that the Commission expressed that Article 12(3):

> precludes sanctions being imposed on individuals on the basis of information

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[54] This 'subject matter' restriction seems to implement the *Dow Benelux* case, Case 85/87 *Dow Benelux* [1989] ECR 3137, para 17-20, as the Commission Notice suggests. See: Cooperation Notice, n 10 above, para 28(b).

[55] Article 12(2), second sentence.

[56] Ibid, para 28(a).

[57] Ibid, para 28(c).

[58] Article 12(3), 1. recital.

[59] Ibid, 2. recital.

[60] D Reichelt, n 9, above, 781, and Cleary, Gottlieb, Steen Hamilton, 'Comments on draft European Commission Notices and draft regulation implementing Regulation 1/2003' as citied in Reichelt, 778.

> exchanged pursuant to the Council Regulation if the laws of the transmitting and the receiving authorities do not provide for sanctions of a similar kind in respect of individuals, unless the rights of the individual concerned as regards the collection of evidence have been respected by the transmitting authority to the same standard as they are guaranteed by the receiving authority.[61]

This would be so, since Article 12(3) does not provide for an assessment by the receiving NCA whether the standards are comparable in cases where the exchanging MSs have 'similar kind of sanctions'.[62] Thus, one could conclude that in the case of criminal sanction of a 'similar kind' a principle of the country of origin applies. In this sense the Commission formulates:

> If both the legal system of the transmitting and that of the receiving authority provide for sanctions of a similar kind ... information exchanged pursuant to Article 12 of the Council Regulation can be used by the receiving authority. In that case, procedural safeguards in both systems are considered to be equivalent.[63]

Altogether, one could describe this as a classical case of dual criminality: one authority assists the other when both have sanctions of a similar kind.

The second recital of Article 12(3), however, softens the dual criminality approach to some extent. In the case that the exchanging MSs do not both provide for sanction of a 'similar kind', Article 12(3) distinguishes between cases of custodial sanctions and other sanctions.[64] Where the transferring MS does not provide for custodial sanctions the use of the exchanged information by the receiving MS to impose such sanctions is prohibited. With regard to proceedings concerning other sanctions, which are not available in the transferring MS, the Regulation requires that the information can only be used if 'the same level of protection of the right to defence' existed in the transferring MS.[65]

Thus, the strict dual criminality requirement has been modified. It is still in place with regard to custodial sanctions, but for cases involving non-custodial sanctions it has been replaced by a system where the level of protection of the right to defence is compared.

If one would transfer these finding to a practical level one can identify 9 different cases:

Case 1: MS C1 with criminal/custodial sanctions for individuals can use the evidence provided by MS C2, which equally has custodial sanctions for individuals.

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[61] Cooperation Notice, n 10, above, para 28(c).

[62] D Reichelt, n 9, above, 781.

[63] In this sense also Cooperation Notice, n 10, above, para 28(c).

[64] See ibid.

[65] A higher standard should not be an obstacle.

Case 2: MS C1 cannot use the evidence provided by MS N2, which has non-custodial sanctions for individuals, for custodial sanctions. C1 can, however, use the information for non-custodial sanctions [66]

Case 3: MS C1 cannot use the evidence provided by MS U2, which does not provide for criminal sanctions for individuals, but only classical fines for undertakings, or the information provided by Commission for custodial sanctions. MS C1 can, however, use the information for non-custodial sanctions, but only if the protection of the right of defence of the individual in MS U2/Commission proceedings is not lower than that in MS C1.

Case 4: MS N1 can use the evidence provided by MS C2 to impose its non-custodial sanctions.[67]

Case 5: MS N1 can use the evidence provided by MS N2, which has equally non-custodial sanctions for individuals.

Case 6: MS N1 can use the evidence provided by MS U2 or the Commission for non-custodial sanctions, but only if the protection of the right of defence of the individual in MS U2 or Commission proceedings is not lower than that in MS N1.

Case 7: MS U1 or the Commission can use the evidence provided by MS C2 without restrictions.

Case 8: MS U1 or the Commission can use the evidence provided by MS N2 without restrictions.

Case 9: MS U1 or the Commission can use the evidence provided by MS U2 without restrictions.

Receiving Member State	**Providing Member State**		
	C2	**N2**	**U2 or the Commission**
C1 cases involving custodial sanctions for individuals	y	n	n
C1 cases involving non- custodial sanctions for individuals	y	y[68]	n

[66] This result is based on the argument that with respect to non-custodial sanctions the MS 'foresees sanctions of a similar kind'. One could, however, equally apply a literal interpretation and argue that the MS do not foresee sanctions of a similar kind. So that MS C1 could use the information for non-custodial sanctions, but only if the protection of the right of defence of the individual in MS N2 is not lower than that in MS C1. This question might be an interesting question for a preliminary ruling.

[67] Provided that one follows the interpretation that the lower level of sanctions (no custodial sanctions on part of MS N1) does not hinder the classification that the MS 'foresees sanctions of a similar kind'. The more restrictive, literal interpretation would in this case equally demand that the protection of the right of defence of the individual in MS C2 is not lower than that in MS N1 to use the evidence for non-custodial sanctions.

[68] Based on the interpretation given in n 66, above.

C1 cases not involving sanctions for individuals	y	y	y
N1 cases involving non- custodial sanctions for individuals	y[69]	y	n
N1 cases not involving sanctions for individuals	y	y	y
U1 cases not involving sanctions for individuals	y	y	y
Usage allowed: y Usage not allowed: n Usage only allowed, if level of protection of the rights of defence of natural persons in the providing MS is not lower as in the receiving MS: y/n			

On the whole it has to be concluded that Regulation 1/2003 does not limit the gathering of information, the gathering is only limited by national procedural rules. In this respect a principle of country of origin seems to be established: the receiving MS is not empowered to use its national procedural law to review the legality of the gathering of the information at the transmitting MS.[70] However, in turn, this does not necessarily mean that the receiving MS would need to accept that the information cannot be used because it was gathered illegally in the country of origin. Instead it is for the national law of the receiving MS to determine the consequences of illegal gathering of information. Thus, the usage of this illegal gathered information might not be admissible in the providing MS but might be admissible in the receiving MS.[71]

With regard to the exchange of the information it has been explained that Regulation 1/2003 does not provide any limits on the exchange of information but leaves this at the discretion of the national authorities.

The only limits that the Regulation imposes are limits on the usage of the information provided. Here, the Regulation seems to impose a modified dual criminality requirement. In cases where both MSs have criminal sanctions of similar kind the usage is allowed, even if the standards with regard to procedural safeguards are not the same. One could describe this as a principle of country of origin with regard to national procedural law. The dual criminality requirement is, however, softened. This is so since, the use of the exchanged information is possible in cases involving sanctions that are not of similar kind when the protection of the right to defence in both MSs is equal.

[69] Based on the interpretation given in n 67, above.

[70] See also D Reichelt, n 9, above, 779.

[71] See to the contrary M Woude, n 52, above, 383–384, who argues that the highest standard would always prevail. That is to say, where information may not be used in the providing state it may not be used in the receiving state; on the other hand information usable in the providing MS would not be usable in the receiving state if the national procedural law of the receiving state would prevent the usage.

Though this does not extend to cases concerning custodial sanctions, as in these cases the strict dual criminality requirement applies.

As the competition authorities are, however, not required to provide information they might decline to do so. For example they might decline to provide information because this information, even though gathered illegally in the transmitting MS, might be admissible in the courts of the receiving MS. The authority of MS U1 might equally decline to provide the information because it suspects that this information might help the receiving MS C2 to prosecute a citizen of MS U1. This is so because even though the information might not be directly usable in the criminal proceedings due to Article 12(2), (3) of Regulation 1/2003 it can be of indirect help: the authorities of MS C2 could find evidence that could not have been found without the exchanged information. Or put differently: the receiving national 'authorities are unlikely to forget the information received under Article 12'.[72]

6.2. EEW

In contrast to the discretionary system with restrictions on the usage of information under Regulation 1/2003, the EEW sets up a mandatory system and, in the light of the effectiveness of judicial cooperation in criminal matters, very limited grounds for non-recognition.[73]

However, an important limit to the co-operation under the EEW is linked to the question of the dual criminality requirement as ground for refusal. In this regard it has to be differentiated between search or seizure and other measures.

While the co-operation within the ECN does not require dual criminality in cases of search and seizure, as the investigation takes place 'on behalf and for the account of the competition authority of another Member State', Article 22 of Regulation 1/2003.[74] The dual criminality requirement comes, however, into play as soon as sanctions against individuals are concerned. In such cases Article 12(3) of Regulation 1/2003 imposes a strict dual criminality requirement with regard to the usage of information exchanged in cases involving sanctions against individuals.

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[72] Ibid, 381.

[73] Enumerated in Article 13 refusal is possible for example when the EEW would: infringe the ne bis in idem principle, it would be impossible to execute the EEW by the measures available to the executing authority, if immunity or other privileges under the law of the executing MS would make the execution impossible, the EEW for a search or seizure has not been validated by a judge, a court, an investigating magistrate or a public prosecutor (see Article 11(4)), on territorial grounds, the execution would 'harm essential national security interests, jeopardise the source of the information or involve the use of classified information relating to specific intelligence activities', or the EEW standard form is 'incomplete or manifestly incorrect'.

[74] This may be explained by the reason that the co-operation within the ECN is not primarily seen as co-operation in criminal matters but in competition law cases. However, if one would argue that the sanctions in competition cases are to be considered as criminal in nature (which would also be the conclusion that might be reached when applying the definitions contained in the framework decision on the EEW, see text to n 26 – n 29, above, then it could be said that in this regard dual criminality exists, as behaviour contrary Article 101 and 102 TFEU is forbidden in all MS.

In contrast to Regulation 1/2003 the co-operation within the framework of the EEW distinguishes between the gathering of information and gathering in form of search and seizure. Article 14(1) of the framework decision sets out that, with regard to the exchange and gathering of information, no dual criminality requirement applies, where no search and seizure is involved. Therefore, all information that is gathered without search and seizure[75] can be exchanged under the EEW and used within the boundaries set by the national procedural law of the MS issuing the EEW.[76]

Only in cases where the execution of the EEW involves search and seizure a (softened) dual criminality requirement comes into play pursuant Article 14(2)(3) of the framework decision.[77] In this context it has to be born in mind that the criminality as understood by the framework decision does not mean that the conduct must be a criminal offence in the classical sense; as it has been shown[78] that administrative sanctions can also be considered as criminal in the sense of the framework decision. Hence, the dual criminality requirement would be fulfilled in cases where one MS imposed a criminal sanction and other administrative sanctions on individuals.[79]

With regard to EEW in competition cases this would mean:

a) Search and seizure measures may be subject to dual criminality, i.e. the search and seizure *could*[80] be refused in the executing MS if it does not foresee *any* kind of sanctions against individuals in competition cases.

b) The exchange and usage of information gathered without search and seizure measures or which are already in possession of the executing authority[81] is not restricted.

If one would apply the same matrix as established above for the co-operation under Article 12 of Regulation one would have the following result.

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75 In this context it is also important to bear the scope of the EEW in mind, see text to n 31 – n 34, above.

76 In this regard see Article 7 of the framework decision on the EEW, n 1, above, 76.

77 Article 12(2) sets out that the dual criminality applies for all other offences than those listed in Article 14(2) of the framework decision on the EEW. However, it is important to note that Germany has pushed for an option (a Declaration) under which it can 'make execution [of the EEW for search and seizure] subject to verification of double criminality in the case of the offences relating to terrorism, computer-related crime, racism and xenophobia, sabotage, racketeering and extortion and swindling' unless the issuing MS makes a statement that the offence in question meets certain criteria.

78 See text to n 25, above.

79 One might in this context think of co-operation between the UK (criminal sanction against individuals) and Germany (administrative sanctions against individuals).

80 Not would *have to*. This element of discretion might be compared to the discretion which applies to all cases under Article 12 of Regulation 1/2003.

81 So also information gathered by means of search and seizure before the EEW was issued.

Issuing Member State	Executing Member States					
	C2		N2		U2	
	No Search or Seizure	Search or Seizure	No Search or Seizure	Search or Seizure	No Search or Seizure	Search or Seizure
C1 cases involving custodial sanctions for individuals	y	y/n	y	y/n	y	y/n
C1 cases involving non-custodial sanctions for individuals	y	y/n	y	y/n	y	y/n
C1 cases not involving sanctions for individuals	y	y/n	y	y/n	y	y/n
N1 cases involving non-custodial sanctions for individuals	y	y/n	y	y/n	y	y/n
N1 cases not involving sanctions for individuals	y	y/n	y	y/n	y	y/n
U1 cases not involving sanctions for individuals	y	y/n	y	y/n	y	y/n
Exchange and Usage allowed: y Exchange and Usage not allowed: n Exchange (i.e. execution) might be made subject to dual criminality, gives discretion[82] = y/n						

This table shows, in comparison to the table on the usage of the information exchanged pursuant Article 12 of Regulation 1/2003, that the regime for the co-operation in criminal cases is not as strict as the regime developed in the context of ECN. While the regime of Article 12 of Regulation 1/2003 shows four cases where the information exchanged cannot be used in criminal cases against individuals, the table on the EEW shows not a single absolute case.[83] Instead it introduces discretion, however, only for cases involving search or seizure.[84] With regard to the distinction between search or seizure measures and other measures it is important that the EEW introduces another limitation. Even though a competition authority could issue an EEW, according to Article 2 (c)(ii), the executing authority in the other MS may refuse the execution of the EEW in cases of search or seizure 'if the issuing authority is not a

[82] This discretion is given to the MS who have to implement the framework decision. The MS, however, might equally decide to give discretion to the executing authority. *Cf* the case of Article 12 of Regulation 1/2003 which seems to give discretion to the competition authority concerned.

[83] Like the cases in Regulation 1/2003 where the usage is absolutely prohibited.

[84] In this context it might also be important to recall that the exchange of information under Article 12 in general is subject to a discretion on part of the authority which receives the request of information exchange.

judge, a court, an investigating magistrate or a public prosecutor and the EEW has not been validated by one of those authorities'.[85]

7. INTERIM CONCLUSION

In conclusion, it seems that a competition authority might be able to receive co-operation under the EEW that goes further than under Regulation 1/2003. This is so, because:

a) execution of the EEW is mandatory as compared to the discretionary regime under Article 12 of Regulation 1/2003,

b) as the information received under the EEW can always be used in criminal proceedings against individuals,[86]

c) strict time limits apply.

This result that co-operation in terms of the EEW seems to go further than the co-operation under Regulation 1/2003 might be caused by the fact that the system established under Regulation 1/2003 seems (still) to be built on the principle of mutual assistance rather than mutual recognition as the EEW.[87] In line with the Commission's Green Paper on obtaining evidence in criminal matters from one MS to another and securing its admissibility, one could argue that the availability of these different regimes:

> makes the application of the rules burdensome and may cause confusion among practitioners. This can also result in situations where practitioners do not use the most appropriate instrument for the evidence sought. Ultimately, these factors may therefore hinder effective cross-border cooperation. Furthermore, instruments based on mutual assistance, may be regarded as slow and inefficient given the fact that they do not impose any standard forms to be used when issuing a request for obtaining evidence located in another Member State or any fixed deadlines for executing the request.[88]

The fact that the co-operation in the area of criminal law seems closer and more efficient than in competition law is particularly intriguing, since co-operation in competition cases takes place in an area of law which has a much higher degree of

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[85] Article 11(4) of the framework decision on the EEW, n 1, above, 77.

[86] At least in terms of EU law. Limitation that might arise from national procedural law should not be considered in this context.

[87] Very critical of the principle of mutual recognition in the area of criminal law: S. Peers, 'Mutual Recognition and Criminal Law in the European Union: Has the Council got it wrong?' (2004) 41 CMLR 5, arguing that this principle should not lead to the abolition of the dual criminality requirement. Also critical M. Möstl, 'Preconditions and Limits of Mutual Recognition' (2010) 47 CMLR 405, comparing mutual recognition in the internal market with the application of this principle in the area of criminal law.

[88] Commission Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility (Brussels 11.11.2009) COM(2009) 624 final 4.

harmonisation[89] than criminal law.[90] Moreover, this intriguing result leads to the grotesque situation where the co-operation in an area mainly designed for the prosecuting of individuals sets lower standards regarding the exchange of information than the co-operation in cases where undertakings are involved.[91]

However, this development might also lead to cases where the interaction between the co-operation within the ECN and the EEW results in cases where the safeguards of either one are circumvented. Here, three hypothetical and potentially critical cases regarding the interaction between the co-operation within the ECN and the EEW might easily be identified.

The first case would be a case where the receiving authority in the other MS does reject the request to share the information under Article 12 of Regulation 1/2003.[92] It seems that the requesting competition authority could then use the EEW to become an issuing authority and compel the reluctant authority to pass on the information, as long as the grounds for refusal pursuant Article 13 of the framework decision do not exist.

The second case would involve a request by one competition authority under Article 22 of Regulation 1/2003 involving the search of premises and seizure of documents. The requesting authority could then use the EEW to obtain the documents seized as material already in the possession of the executing authority. It would, thereby, effectively circumvent the requirement of having the EEW issued by a judge, court, investigating magistrate or public prosecutor to be recognised and would also circumvent the dual criminality in cases of search and seizure set out in Article 14(3) of the framework decision on the EEW. Moreover, such a procedure could also be used to circumvent the limits of the framework decision set out in Article 4 regarding live evidence, as it might be possible for the receiving competition authority to obtain this information in proceedings under Article 22 of Regulation 1/2003. Finally, the use of the EEW in these cases would circumvent the restriction regarding the use of information contained in Article 12(3) of Regulation 1/2003.

In the third case the co-operation between the competition authorities under Article 12 of Regulation 1/2003 has lead to the case that information has been exchanged but

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89 Perhaps this area of law might even be described as the area of law with the highest degree of harmonisation, as in all MSs conduct prohibited by Article 101 and 102 TFEU is also illegal under national law.

90 Where harmonisation only starts to take place gradually. With regard to the harmonisation in criminal law see for example: S Peers, 'The European Union and Substantive Criminal Law: Reinventing the Wheel?' (2002) 33 *Netherlands Yearbook of International Law* 47; EJ Husabø, *Harmonization of Criminal Law in Europe*, Antwerpen, Intersentia, 2005; B Hecker *Europäisches Strafrecht*, 2nd aktualisierte und erw. Aufl, Berlin, Springer, 2007, 309–443; V Mitsilegas, *EU Criminal Law*, Oxford, Hart, 2009, 59–110.

91 A reason that might explain this situation could be that while the primary goal of the EEW is to regulate the exchange of information between the MS authorities, this is not the primary goal of Regulation 1/2003. Regulation 1/2003 seems to regulate the co-operation more en passant, as a by-product of the decentralisation and the detailed regulation of powers of the Commission vis a vie national authorities.

92 Though it has been argued that a rejection would never happen in practice due to the dynamics of a network, see in this regard F Cengiz, n 8, above, 12.

cannot be used in the case against an individual. Could the requesting competition authority request the information again, now by means of EEW, in order to use the information in the case against the individual? If so, one would need to ask why the competition authority should not be allowed to use the information in the first place. This is so, since otherwise one might face a situation where the information is sent back to the providing authority[93] in order to regain it by means of the EEW to use it in the case against the individual.

8. POSSIBLE SOLUTIONS

It has been seen that mechanisms for co-operation differ notably. This difference seems to be linked to their different origin: the Regulation 1/2003 as a (former) first pillar instrument and the EEW as co-operation instrument of the (former) third pillar. Taking into account that the Lisbon Treaty merges these two pillars, one might ask if the different regimes for the exchange of information should still apply in cases concerning competition and criminal proceedings, especially as one would expect that a finding made in criminal cases can be used in competition cases.[94]

Against this background and assuming that closer co-operation is the way forward[95] it seems that the principle of mutual recognition will replace mutual assistance with regard to co-operation and exchange of information in competition cases in the long term. Three solutions seem possible, two external, i.e. outside the current framework of Regulation 1/2003, and an internal, i.e. by reforming Regulation 1/2003.

The most ambitious, and perhaps the most effective solution, would be an external one. The different legal regimes for co-operation and information exchange are replaced by a single instrument based on the principle of mutual recognition. This regime would be governing the co-operation and exchange of information between all law enforcement agencies in the Union. This would mean that the Union level would equally be encompassed, i.e. the Commission.[96] It would closely resemble to the principle of availability,[97] where information held by one law enforcement agency is made available to another law enforcement agency if needed. Arguably, such a system would provoke an intense debate and is not likely to succeed.

A smaller but equally ambitious version of this external solution would be the adoption of this framework without including the Union's enforcement authority, i.e. Commission. Such a solution would probably create the same debate and would

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93 Perhaps because it is evidence, which exists only once or cannot be reproduced.

94 See in this regard section 2. Starting Point/General Hypothesis, above.

95 This is not to say that this is the optimal way forward. The paper shows potential ways forward, so that an informed discussion about the optimal way is possible. Note S Peers, n 87, above, and M Möstl, n 87, above, which are both critical of the developments regarding mutual recognition in criminal law.

96 The co-operation between the Commission and the national competition authorities is still only governed by Regulation 1/2003 as the EEW only governs the relationship between law enforcement agencies of the MSs.

97 See in this context for example: Proposal for a Council framework decision on the exchange of information under the principle of availability (Brussels 12.10.2005) COM(2005) 490 final.

furthermore have the disadvantage that 'most effective co-operation' between the Commission and the national competition authorities would not be guaranteed.

The least ambitious and therefore feasible solution would be an internal solution, i.e. a reform of the co-operation mechanisms provided under Regulation 1/2003 and in particular Article 12. The reform would replace mutual assistance with a system of mutual recognition in order to bring Regulation 1/2003 in line with the co-operation mechanisms in criminal matters and especially the EEW. The most important element of such a reform would be the removal of the discretionary element in Article 12(1) of Regulation 1/2003. Instead narrow grounds for refusal would be implemented. This could, perhaps, be along the lines of the proposed council framework decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters.[98] So refusal would only be allowed in order:

- to avoid jeopardising the success of an on-going investigation;
- to protect a source of information or the physical integrity of a natural person;
- to protect the confidentiality of information at any stage of processing; or,
- to protect the fundamental rights and freedoms of persons.

Moreover, the restriction on the use of the information exchanged contained in Article 12(3) would be abolished. The complete abolition of the dual criminality requirement seems to be the general way forward pushed for by the Commission. Even though a complete abolition might seem to be a bold proposal, it is in line with the current trend of reducing the dual criminality requirements and the Commission's approach.[99] This would mean that the question how the information gathered in proceedings against undertakings can be used in proceedings against individuals would be left to the national level. One might argue this would not create serious problems, as the MSs, in European competition cases, are also bound by the Charter of Fundamental Rights, the ECHR and even by national fundamental rights. Hence, the 'risk created' for fundamental rights protection, by leaving this matter to the MSs, seems not too high. Moreover, one might ask: 'why should the Union be in a better position to protect fundamental rights than the MSs and in particular national courts?' To counter problems that might arise out of the different standards of human rights protection in the MSs, one could also include[100] a section like Article 7 of the framework decision on the EEW that sets out, that:

> Each Member State shall take the necessary measures to ensure that the EEW is issued only when the issuing authority is satisfied that the following conditions have

[98] Ibid.

[99] See for example the Green Paper, n 88, above.

[100] Though this seems to substantially lessen the idea and impact of mutual recognition. It would, however, address the criticism expressed in the context of Regulation 1/2003 and a possible trading down effect with regard to standard of fundamental rights protection. In this line for example: A Andreangeli, n 53, above.

been met:

(a) obtaining the objects, documents or data sought is necessary and proportionate for the purpose of proceedings referred to in Article 5;

(b) the objects, documents or data can be obtained under the law of the issuing State in a comparable case if they were available on the territory of the issuing State, even though different procedural measures might be used.

Finally, it is important that the Commission would be included in this new exchange regime. This would ensure the highest possible degree of efficiency with regard to co-operation and might furthermore help to overcome the current hierarchical structure of the ECN.[101]

9. CONCLUSION

It has been shown that the co-operation and information exchange mechanisms in competition cases established by Regulation 1/2003 have been overtaken by the means provided by the EEW. This result is surprising as competition law is an area of law with a much higher degree of harmonisation than criminal law. However, the fact that the co-operation in terms of EEW is more effective than the one under the ECN might be explained as a consequence of models and times when the instruments were developed. While the system established under Regulation 1/2003 seems to be assembled having the systems of mutual assistance in mind, the EEW is built on the newer principle of mutual assistance and goes further than any other previous instrument in this area. The paper has also explained that, in general, national competition authorities have both means available: (i) the classical ECN route provided by Regulation 1/2003 and (ii) the EEW. The inconsistencies that might be produced by the current system of different instruments have been explained and in the light of the merging of the (former) first pillar and (former) third pillar under the Lisbon Treaty three possible reforms have been put forward. These suggested reform proposals and the inconsistencies explained should form the basis for an interesting (and controversial) debate on the right balance between effective law enforcement in cross-border competition cases and the protection of fundamental rights.

[101] With regard to the current atypical structure of the ECN see: F Cengiz, n 8, above.