

**INTERACTIONS BETWEEN
COURTS AND ADMINISTRATIVE AUTHORITIES
IN EU COMPETITION LAW ENFORCEMENT**

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ABSTRACT

Interactions between Courts and Administrative Authorities in EU Competition Law Enforcement

The EU competition law reforms of 2004 decentralised enforcement from the European Commission to national competition authorities and national courts, while the European Commission remains central to the system. This thesis responds to a need for research into how institutions interact in this system of concurrent competences to effectively enforce the EU competition rules. It explores the constitutional consequences of the methods for ensuring coherent interpretation and effective application of the EU competition rules, through case studies on the interaction between courts and administrative authorities and between the supranational and national levels. With a focus on the role of courts, the thesis draws on the EU principle of institutional balance and the concept of interpretative pluralism. It finds that while apparently empowering (national) courts, the post-2004 regime still limits the ambit of judicial competence in favour of administrative bodies. The European Commission can influence interpretation of the competition rules in national court proceedings as well as in the European Competition Network of competition authorities, in which the Court of Justice of the European Union has in effect handed over responsibility. In an extension of national courts' obligation not to rule counter to a European Commission decision, forthcoming legislation proposes they should be bound by national competition authority decisions. The thesis argues that there should be more emphasis on horizontal relationships between courts, led by judges themselves. This would not only lend itself to coherent – and effective – application of competition law, but would allow courts to push back against the apparent dominance of administrative authorities in this area.

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Table 2. European Commission own-initiative interventions in national court proceedings under Art 15(3) Regulation 1/2003

LIST OF ABBREVIATIONS

A-G	Advocate General
Brussels I Regulation	Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
CJEU	Court of Justice of the European Union
Commission	European Commission (of the European Union)
DG COMP	European Commission Directorate General for Competition
EC	European Community (European Community Treaty when after an Article number)
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECN	European Competition Network
EP	European Parliament
EU	European Union
GC	General Court (of the European Union)
MS	European Union Member State(s)
NCA	National competition authority
NCAs	National competition authorities
OFT	Office of Fair Trading, UK
Reg	Regulation
SWP	(European Commission) Staff Working Paper
TFEU	Treaty on the Functioning of the European Union
TEU	Treaty on European Union
Union	European Union

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13983/02 Working Party to COREPER, 8 November 2002

14327/02 preparation of political agreement, 15 November 2002
(incorporating Document: 14327/02 corrigendum (to 13983/02), 18 November 2002)

14471/02 political agreement COREPER, 21 November 2002

14815/02 Minutes of meeting of Competitiveness Council held on 26 November 2002, 5 December 2002

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CHAPTER 1: INTRODUCTION

European Union competition law is of central importance to the functioning of the internal market. Since the 2004 reform of EU competition law the number of courts, administrative authorities and quasi-judicial bodies involved in enforcement of the rules, and the scope of their functions, has increased. The reform was described as a “legal and cultural revolution in proposing the fundamental reorganization of existing responsibilities between the Commission, national authorities and national courts”.¹ The interactions between these judicial and administrative authorities, and between the supranational and national levels, are important for effective application of the competition rules. However, the tools chosen to promote this effectiveness have wider constitutional implications for the roles of courts and administrative authorities. The thesis therefore investigates these interactions and sets them within the literature on institutional balance and interpretative pluralism.

This chapter first sets the context of the 2004 reforms and developments since then. The second section lays out the research questions, the third section outlines the contributions of the thesis, and the fourth section discusses the methodology. The fifth section contextualises the case studies in the later chapters of the thesis by introducing a diagram to show the interinstitutional relationships in the EU competition enforcement system. The sixth section gives an outline of the thesis as a whole.

1. The context of the post-2004 competition enforcement regime in the European Union

EU competition law enforcement has been subject to far-reaching reforms over the last decade. The most significant reform came in 2004 with Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 (now 101 and 102) of the Treaty² and its accompanying Modernisation Package.³ Article 101 TFEU

¹ C-D Ehlermann ‘The Modernization of EC Antitrust Policy: A Legal and Cultural Revolution’ (2000) 37 *Common Market Law Review* 537-574, 537

² 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, OJ L 1, 4.1.2003, 1-25

³ Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123, 27.04.2004, 18-24; Commission Notice on cooperation within the Network of Competition Authorities OJ C 101, 27.04.2004, 43-53; Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC OJ C 101, 27.04.2004, 54-64; Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty OJ C 101, 27.04.2004, 65-77; Commission Notice on informal guidance relating to novel questions concerning

governs agreements between firms and Article 102 prohibits the abuse of a dominant position. These articles had been enforced by the European Commission's Directorate General for Competition (DG IV, now DG COMP) since the early years of the European Economic Community,⁴ partly because Member States did not have developed competition authorities. While national courts and competition authorities were in principle able to apply the rules, firms were required to notify their agreements under Article 101 TFEU to the Commission for approval. Having found an anticompetitive agreement, only the Commission was empowered to grant an exemption and approve it under what is now Article 101(3). Member State civil courts were not able to consider whether an agreement could be exempted, and so were stymied in their ability to adjudicate disputes between private parties based on the EU competition rules.

A number of factors led to reform. Eventually a backlog of notifications accumulated and the Commission had to implement a solution of 'comfort letters' which were of uncertain legal status.⁵ The Commission was faced with increasing criticism from the late 1990s,⁶ by which time a number of Member States had their own functioning competition authorities. The notification system was also ineffective at targeting the most harmful cartels, and the Commission needed to free up resources to do so. Faced with EU enlargement from 15 to 25 Member States in 2004, with a further two in 2007, the centralised system looked increasingly unworkable.

The 2004 reforms⁷ brought about two significant changes, ending the Commission's dominance over enforcement. One was the abolition of the notification procedure. The

Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters) OJ C 101, 27.04.2004, 78-80; Commission Notice - Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty OJ C 101, 27.04.2004, 81-96; Commission Notice - Guidelines on the application of Article 81(3) of the Treaty OJ C 101, 27.04.2004, 97-118

⁴ Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty [1959-1962] OJ 13, 21.2.1962, 204

⁵ See e.g. B Wodz 'Comfort Letters and Other Informal Letters in EC Competition Proceedings – Why the Story is Not Over' (2000) 21(3) *European Competition Law Review* 159-169

⁶ See e.g. P Massey 'Reform of EC Competition Law: Substance, Procedure, Institutions', in B Hawk (ed) *Annual Proceedings of the Fordham Corporate Law Institute 1996* (Juris Pub Inc, 1997), 91; A Pera & M Todino 'Enforcement of EC Competition Rules: Need for a Reform?' in the same volume, 125. M Siragusa 'Rethinking Art 85: Problems and Challenges in the Design and Enforcement of the EC Competition Rules' *Annual Proceedings of the Fordham Corporate Law Institute 1997* (Juris Pub Inc, 1998), 271

⁷ For assessment of the reforms see e.g. C-D Ehlermann 'The Modernization of EC Antitrust Policy: A Legal and Cultural Revolution' (2000) 37 *Common Market Law Review* 537-574; H Kassim & K Wright 'Bringing Regulatory Processes Back In: The Reform of EU Antitrust and Merger Control' (2009) 32(4) *West European Politics* 738-755; A Riley 'EC Antitrust Modernisation: The Commission Does Very Nicely – Thank You! Part 1: Regulation 1 and the Notification Burden', (2003) 24 (11) *European Competition Law Review* 604-615; A Riley 'EC Antitrust Modernisation: The Commission Does Very Nicely – Thank You! Part 2: Between the Idea and the Reality: Decentralisation under Regulation 1' (2003) 24 (11) *European Competition Law Review* 657-672; J Venit 'Brave New World: The

second, more important for these purposes, was the decentralisation of enforcement, empowering national competition authorities and national courts to apply Articles 101 and 102 in their entirety, including assessing whether conduct falls under the exempting conditions of Article 101(3), previously within the exclusive jurisdiction of the European Commission. This is not a complete decentralisation, as the European Commission still retains the competence to apply the rules and retains a central role. This differs from the general model of EU law, which is enforcement at the national level. As a result, there are concurrent competences between the supranational and national levels, and between courts and administrative (or quasi-judicial) authorities.

A further aim of the 2004 reform, and subsequently of the European Commission's White Paper on damages actions,⁸ was to encourage private enforcement of competition law by firms and individuals through national courts, without it compromising public enforcement through national competition authorities. This would free up resources for the Commission and competition authorities to detect and investigate the most harmful anticompetitive activity in the public interest. In decentralising enforcement to national courts as well as competition authorities, the door is open to claimants to act as enforcers ('private attorney generals'⁹) closest to infringements. It also allows those who suffer losses as a result of competition law infringements to gain individual redress – while they can impose fines, competition authorities are less well placed to compensate individuals who are harmed by competition law breaches, and the Commission itself is not empowered to grant damages.

There is a balance to be struck to ensure that public and private enforcement are complementary.¹⁰ The principal aim of public enforcement is deterrence, through punishment such as fines or imprisonment. Private enforcement can also contribute to a

Modernization and Decentralization of Enforcement under Articles 81 and 82 of the EC Treaty' (2003) 40 *Common Market Law Review* 545-580

⁸ Commission White Paper on damages actions for breach of the EC antitrust rules, COM (2008) 165, Brussels 2.4.2008

⁹ Particularly used in the US context where private actions in competition enforcement are more prevalent. In the EU literature see e.g. A Andreangeli 'From Complainant to "Private Attorney General": the Modernisation of EU Competition Enforcement and Private Antitrust Action before National Courts' in J Peay and T Newburn (eds) *Policing: Politics, Culture and Control. Essays in Honour of Robert Reiner* (Hart Publishing, 2012) 229-54; K Cseres 'Governance Design for European Private Law: Lessons from the Europeanization of Competition Law in Central and Eastern Europe' in F Cafaggi (ed) *Making European Private Law: Governance Design* (Edward Elgar, 2008) 138-196, 143

¹⁰ See e.g. W Wils 'Should Private Antitrust Enforcement Be Encouraged in Europe?' (2003) 26(3) *World Competition* 473; C Jones 'Private Antitrust Enforcement in Europe: A Policy Analysis and Reality Check' (2004) 27(1) *World Competition* 13; A Komninou 'Public and Private Antitrust Enforcement in Europe: Complement? Overlap?' (2006) 3(1) *Competition Law Review* 5-26; W Wils 'The Relationship Between Public Antitrust Enforcement and Private Actions for Damages' (2009) 32(1) *World Competition* 3

deterrent effect if firms are exposed to liability in damages. This is particularly likely if a private party claims for damages after a competition authority has found an infringement and perhaps already imposed a fine. However, firms are less likely to come forward and admit anticompetitive conduct under a leniency programme if that admission will then be used against them in private actions for damages.¹¹ Primarily in private enforcement the court is called upon to compensate a firm or individual. Legislation was expected in late 2012 on damages actions,¹² inviting an examination of how public and private enforcement, and, institutionally, competition authorities and courts, interact.

The decentralisation of enforcement of Articles 101 and 102 TFEU, and the recent emphasis on private enforcement, has led to an increase in the powers and jurisdiction of national courts as well as competition authorities. Decentralised enforcement carries greater risks of divergent application of EU antitrust enforcement rules. National competition authorities are closely linked to each other and the Commission through the cooperation mechanisms of the European Competition Network (ECN), with its rules for case allocation and consistent application of Community competition law.¹³ However, no such mechanism exists for national courts (unless they are also designated as competition authorities by the Member State). This is for the practical reason that there are numerous judges throughout the EU who could hear competition claims; but also from a constitutional perspective, it would be seen to interfere with principles of judicial independence and national procedural autonomy.

As a result, there are certain tools in Regulation 1/2003, in the forthcoming draft directive on damages actions and in the wider EU legal system which aim at coherent application of the rules by competition enforcers and bridging public and private enforcement of competition law. The preliminary reference procedure, in which national courts ask questions of the Court of Justice of the European Union (CJEU) on the interpretation of EU law, remains an important judicial link, but, as shown in this thesis, is likely to exclude national competition authorities (except where a national court is also designated a competition authority). Building on existing case law in which national courts should follow Commission decisions, Regulation 1/2003 includes the possibility for the Commission to give opinions in national court proceedings with an instrument analogous to the preliminary reference, and also to intervene at its own initiative. The White Paper

¹¹ The issue in *C-360/09 Pfleiderer AG v Bundeskartellamt* [2011] ECR I-0000

¹² Annex to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and The Committee Of The Regions, Commission Work Programme 2012: Delivering European renewal, Brussels, 15.11.2011 COM (2011) 777 final, 3

¹³ Commission Notice of 27 April 2004 on cooperation within the Network of Competition Authorities, OJ C 101, 27.4.2004, 43-53

and forthcoming draft directive on damages actions includes a proposal for the decisions of national competition authorities to bind national courts throughout the EU. The following chapters consider these tools in detail.

An important question is to what extent the independence of the judiciary is valued when weighed against the Commission's – and NCAs' – potential loss of effectiveness. This situation raises broader questions about the partnership and tensions between judicial and administrative bodies, administrative intervention in judicial decision-making and the role of soft law¹⁴ in a system in which the Commission has legislative, executive, as well as judicial functions.¹⁵ While the CJEU is the ultimate interpreter of EU law generally, the Commission derives a high degree of authority from its historical position as primary competition enforcer in the Union. This calls into question the principle of institutional balance in the European Union on the supranational level, and 'diagonally' between executive agencies and courts between the supranational and national levels. (I use the term 'diagonal' in reference to the diagram in section 5 of this chapter.) This is especially so given the concurrent competences in the post-2004 system.

2. Research questions

The overarching research question is:

- What are the constitutional implications of interaction between courts and administrative authorities, between the supranational and national levels, in EU competition law enforcement?

Deriving from that, with a focus on the role of courts,

- What impact do the 2004 and more recent competition reforms have on national courts and judicial autonomy?

¹⁴ “Rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects.”: L Senden, *Soft Law in European Community Law* (Hart, 2004), 112, developed from F Snyder, ‘The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques’ (1993) 56(1) *Modern Law Review* 19-54, 32: “rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects.”

¹⁵ See, for example, W Wils, ‘The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis’ (2004) 27(2) *World Competition* 201-224

- How can and does the European Commission impact on judicial decision-making at the national level?
- To what extent does the European Commission challenge, or complement, the judicial role of the Court of Justice of the European Union?
- Taken together, how does the interaction of different mechanisms for coherent interpretation and application of EU competition law impact on the relationship between judicial and administrative authorities?

3. Contributions of the thesis

This thesis responds to a recognised need for research into how institutions interact in the post-2004 competition enforcement system in the European Union.¹⁶ It addresses the constitutional consequences of the methods for ensuring coherent interpretation and effective application of the EU competition rules, through case studies on the interaction between judicial and administrative authorities at the supranational and national levels. Going further, it investigates the impact of the interaction between those tools. Given its institutional focus on the relationships between courts and executive agencies, the thesis has significance for EU law and governance more broadly beyond competition law.

This thesis takes forward the understanding of the relatively new concept of interpretative pluralism¹⁷ through case studies. Chapter 2 lays out this theoretical context by linking this with the traditional EU principle of institutional balance and with the role of judges in ensuring coherence. Interpretative pluralism – an aspect of constitutional pluralism – suggests that there is a heterarchy rather than a hierarchy of interpretations of law in the EU system, notwithstanding the position of the CJEU as ultimate interpreter of EU law. This makes some sense in a system of concurrent competences such as in the post-2004 competition enforcement regime. As coined by Maduro, it means that courts do not have a monopoly on the interpretation of the law and that no one institution needs to have the last word. The case studies investigate the plausibility of this idea. They also respond to

¹⁶ K Cseres ‘Editorial: Ten Years of Modernized European Competition Law in Floris Vogelaar’s Landmark Notes’ (2010) 37(1) *Legal Issues of Economic Integration* 1-4, 4: “How institutional designs and interactions between various institutional actors enforcing competition law influence effective enforcement merits further research...Institutional actors matter, not only how they individually enforce the law but also how they are linked to each other...”

¹⁷ M Poiares Maduro, ‘Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism’ (2007) 1(2) *European Journal of Legal Studies* 1-21; J Komarek ‘The Institutional Dimension of Constitutional Pluralism’ in M Avbelj & J Komarek (eds) *Constitutional Pluralism in Europe and Beyond* (Hart 2011) 231-247

Komarek's observation that research on courts' deference to administrative agencies' interpretation of the law "seems to be entirely missing in the EU."¹⁸ However the case studies in this thesis suggest that the findings and interpretation of competition authorities (the majority of which are administrative or quasi-judicial authorities¹⁹), particularly the European Commission, have greater weight. The Commission can influence interpretation of the competition rules in national court proceedings as well as in the European Competition Network, in which the CJEU has handed over responsibility. Interpretative pluralism relates to the concept of institutional balance, the EU's version of the separation of powers. If there is an institutional hierarchy of administrative/executive agencies over courts then this challenges the institutional balance and judicial autonomy at the national level. A plurality of interpretations – and interpreters – of the law suggests a looser concept of unity or coherence. However, the interpretation of national judges is supervised. As the case studies show, in the decentralised system 'coherent' application of the rules appears to mean 'effective' application. While coherence is a central aspect of the rule of law as overseen by judges, effectiveness can be supervised by administrative authorities. Traditional judicial independence considerations are also trumped by the need for effectiveness and efficiency.

In addition to its theoretical contribution, the thesis investigates the emerging practice in the post-2004 regime. This is particularly evident in the contrast between chapter 3 on NCAs' apparent lack of access to the CJEU, and chapter 4 on European Commission intervention in national court proceedings. Chapter 4 sets out a detailed presentation of how Article 15 Regulation 1/2003 operates, tracking all cases in which the Commission has provided an opinion or intervened in national judicial proceedings. This shows the shape of the Commission's role in the decentralised system. In addition, with the potential for private enforcement in national courts increased, it is important to investigate what actually happens in the Member States. More broadly, it contributes to knowledge on how EU law is applied in Member State courts.

The thesis is informed by original research into the *travaux préparatoires* behind Regulation 1/2003 and its accompanying package of notices and guidelines, the basis of the reforms which came into force on 1 May 2004. This research involved consulting drafts and documents relating to the negotiations in the Council of the European Union

¹⁸ J Komarek 'The Institutional Dimension of Constitutional Pluralism' in M Avbelj & J Komarek (eds) *Constitutional Pluralism in Europe and Beyond* (Hart 2011) 231-247

¹⁹ Although some are courts acting in a public enforcement capacity – this is discussed in more detail in chapter 3.

available through the Council's database.²⁰ Although deliberations in the Council are usually secret, it is possible to discover individual Member States' positions on particular articles through footnote annotations in these publicly available documents. The documents also include European Commission staff working papers communicated to the Council, which often give further details of particular proposals. Chapter 5 also considers the consultative process behind the forthcoming EU directive on damages actions through consideration of the responses to the 2008 White Paper on damages actions.²¹

Various parts of the thesis also draw on a series of semi-structured interviews with EU and national officials on the processes leading to the reforms; and on experiences in the first few years of the European Competition Network. These interviews were carried out in the context of another project at the ESRC Centre for Competition Policy, and were co-designed and co-conducted with Prof Hussein Kassim.²²

The thesis also uses original diagrams to illustrate some concepts. As a framework, the interinstitutional relationships discussed in the thesis are conceptualised in the original diagram below in part 5 of this Introduction.

4. Methodology

The thesis has doctrinal, theoretical, empirical and case study elements. The primary approach is doctrinal analysis of case law, decisional practice, legislation and policy documents. It is based around three case studies. A logical basis for the selection of these case studies is shown through the diagram of interactions between different institutions in the competition enforcement system. As its theoretical basis underlying the case studies, the thesis draws on themes of EU constitutionalism through the concept of interpretative pluralism, which is especially relevant in the competition enforcement system of parallel

²⁰ <http://www.consilium.europa.eu/documents?lang=en> (accessed 18.8.2006)

²¹ White Paper on Damages Actions for Breach of the EC Antitrust Rules COM (2008) 165, 2.4.2008. Consultation responses available at http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments.html (accessed 6.7.2010)

²² The interviews on the reform were carried out between July 2005 and July 2006 and included 20 interviewees. The interviews on the European Competition Network were carried out between April 2008 and May 2009 and included 15 interviews. See e.g. H Kassim & K Wright 'Bringing Regulatory Processes Back In: The Reform of EU Antitrust and Merger Control' (2009) 32(4) *West European Politics* 738-755; H Kassim and K Wright 'The European Competition Network: a Regulatory Network with a Difference' Paper presented at European Consortium for Political Research (ECPR) Standing Group on Regulatory Governance, Third Biennial Conference, Dublin, 17-19 June 2010

competences, and the EU principle of institutional balance. The thesis also benefits from insights gained through empirical research in the form of semi-structured elite interviews.

Regarding the research into Commission intervention in national courts, as with any legal research using case law, it is obviously easier to uncover the cases in which the Commission *has* intervened, rather than those where it has not. I uncovered 23 cases where the court had requested an opinion and 9 where the Commission intervened at its own initiative. It is difficult to get an accurate picture of all cases involving the EU competition rules, but there are 335 cases in the Commission's national court judgments database.²³ It is also difficult to observe and measure the impact of the Commission's opinion in the national court proceedings. Nevertheless, it is possible to make some findings from individual cases.

5. The interinstitutional relationships in EU competition law enforcement

The diagram below is designed to show the interinstitutional relationships in EU competition law enforcement and serves as a framework for the case studies in chapters 3, 4 and 5. The case studies relate to the diagonal links between the supranational and national levels, between judicial and executive actors; and the horizontal link at the national level which is affected by EU rules. While the thesis concentrates on these interactions, the other interinstitutional links are also briefly described below to give the wider context.

²³ Coverage of cases here is not complete, as acknowledged in the Report on the Functioning of Regulation 1/2003 in 2009 (Communication from the Commission to the European Parliament and the Council: Report on the functioning of Regulation 1/2003, Brussels 29.4.2009, COM (2009) 206 final). However, it is the most reliable overview.

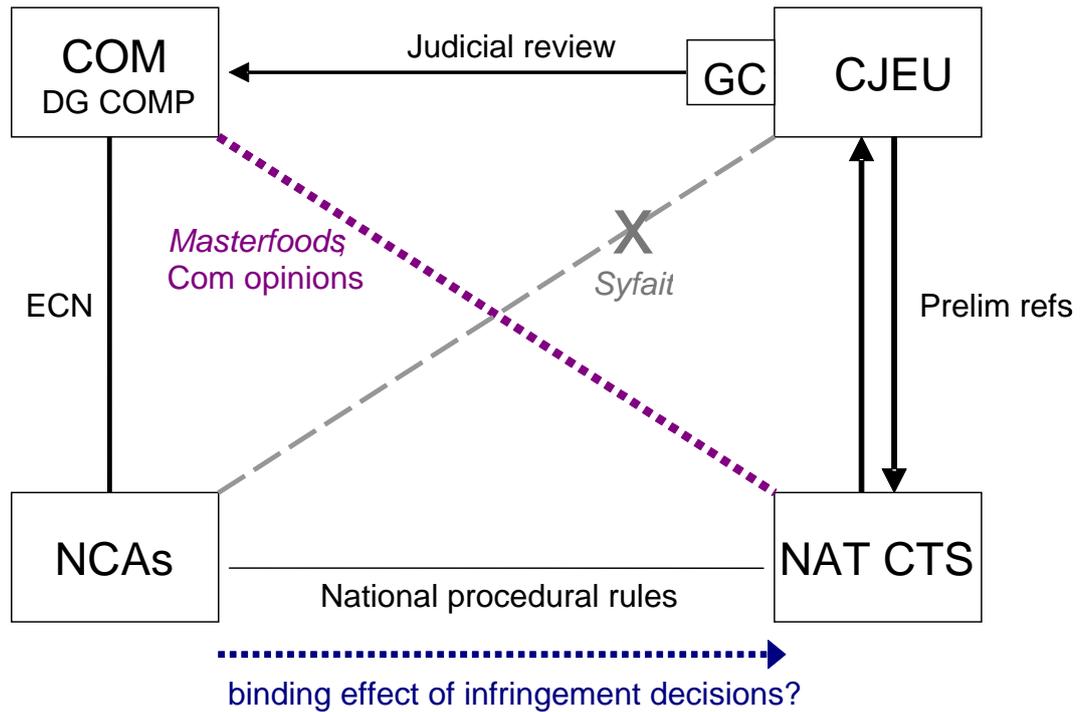


Fig 1. The institutional system of EU competition law enforcement [original in colour]

Key:

Com – European Commission

DG COMP – European Commission Directorate General for Competition

GC – General Court of the European Union

CJEU – Court of Justice of the European Union

Prelim refs – Preliminary references under Article 267 TFEU

Nat cts – national courts

NCAs – national competition authorities

ECN – European Competition Network

'Masterfoods' and 'Syfait' refer to cases

European Commission-General Court/Court of Justice of the European Union: judicial review

The General Court of the European Union is responsible for judicial review of the European Commission's competition decisions. Under Article 263 TFEU an affected firm or individual may apply to the General Court for annulment of a Commission decision relating to Articles 101 or 102 TFEU or to Regulation 1/2003. The Court of Justice itself hears cases on points of law on appeal from the General Court. Through judicial review the

EU courts imbue the Commission with the values and standards it should use in its decision-making, for example, the standard of proof for finding an infringement. On appeal, the CJEU's concern may be overall coherence of competition law with EU law.

This relationship is affected by decentralisation only insofar as decisions which may have been taken by the Commission, subject to review at the Community level, could now be taken at the national level by an NCA, subject to review in a national court. Atanasiu and Ehlermann argue that this implies a qualitative impact - a higher standard of review and closer scrutiny of Commission decisions.²⁴

Commission-National Competition Authorities; National Competition Authorities among themselves: European Competition Network

The relationships between the European Commission and NCAs and NCAs amongst themselves are managed within the European Competition Network. NCAs are obliged to apply EU competition law alongside national competition law where trade between Member States is affected. Article 3 Regulation 1/2003 encapsulates a convergence rule: an NCA may not allow a practice which is prohibited by Article 101 or 102. If practice is not prohibited under Article 101, an NCA cannot apply stricter national rules to prohibit it (but a Member State may choose to apply stricter standards in relation to conduct covered by Article 102). NCAs cannot contradict or overrule an existing Commission decision (Art 16(2)). Only the Commission can make an EU-wide finding that Article 101 or 102 is not applicable to a practice, which binds all national competition authorities (Art 10).

Regulation 1/2003 and the Network Notice²⁵ also incorporate mechanisms for consistent application of the rules and for case allocation and cooperation amongst members of the Network. These include informing each other when opening an investigation or before adopting a decision (article 11(3) and (4) respectively). The case allocation rules are based on the notion of the 'well placed to act' competition authority.²⁶ The Commission retains the power to relieve an NCA of its competence by initiating its own proceedings

²⁴ I Atanasiu & C-D Ehlermann 'The Modernisation of EC Antitrust Law: Consequences for the Future Role and Function of the EC Courts' (2002) 23(2) *European Competition Law Review* 72-80, at 72-3: "...direct applicability of Article [101(3) TFEU] will oblige the European courts to switch from the self-imposed limited control exercised under the current [pre-2004] system to a normal-standard type of judicial review."

²⁵ Commission Notice of 27 April 2004 on cooperation within the network of competition authorities, OJ C 101, 27.04.2004, 43-53

²⁶ Network notice [8]-[15]

under Article 11(6) in exceptional cases.²⁷ Where relevant these rules are discussed in the case study chapters.

National courts among themselves: (potential) judicial cooperation mechanisms

There are no formal links among national judges in competition law enforcement. There is scope for cooperation through soft fora such as the Association of European Competition Law Judges,²⁸ in which members meet to exchange best practice rather than to cooperate in specific cases. The Commission provides funding for training judges in developments in EU competition law and assessing economic evidence. This thesis suggests that horizontal judicial cooperation, led by judges themselves, should be strengthened to enhance the role of courts relative to competition authorities and to make EU-wide enforcement more effective. More broadly, the Brussels I Regulation deals with recognition of judgments from other Member States in civil and commercial proceedings.²⁹

Court of Justice-national courts: preliminary reference procedure

The link between the CJEU and the national courts, and the primary tool for the consistent interpretation of EU law throughout the Member States, is the preliminary reference procedure. Through the doctrine of direct effect, national courts are also EU courts.³⁰ The CJEU is not involved in day-to-day enforcement of EU competition law, but is the ultimate interpreter of Articles 101 and 102 of the Treaty and related legislation. This judicial relationship is not directly affected by the 2004 reforms. Several commentators hypothesised that decentralised enforcement would lead to an increase in preliminary references,³¹ but it may still be too early to say whether an increase has materialised.³²

²⁷ Network notice [54]

²⁸ <http://www.aeclj.com/> (accessed 9.12.2011)

²⁹ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 012, 16.01.2001, 1

³⁰ A-M Slaughter, A Stone Sweet and J Weiler (eds), *The European Courts and National Courts: Doctrine and Jurisprudence* (Hart, 1997) particularly Karen Alter's contribution, 'Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration', 227; I Maher 'National Courts as European Community Courts' (1994) 14(2) *Legal Studies* 226-243

³¹ I Atanasiu & C-D Ehlermann 'The Modernisation of EC Antitrust Law: Consequences for the Future Role and Function of the EC Courts' (2002) 23(2) *European Competition Law Review* 72-80; K Lenaerts & D Gerard 'Decentralisation of EC Competition Law Enforcement: Judges in the Frontline' (2004) 27(3) *World Competition* 313-349

³² A team led by Barry Rodger carried out a multinational study of preliminary references in competition law only up until the 2004 reforms: B J Rodger (ed) *Article 234 and Competition Law: An Analysis* (Kluwer, 2008)

One potential factor in this respect is the opportunity for national judges to ask the European Commission for an opinion, as discussed in chapter 4.

***Commission-national courts: obligations in case law; Article 15 Reg 1/2003**

This relationship is the subject of chapter 4. Article 6 Regulation 1/2003 explicitly provides that national courts shall have the power to apply Articles 101 and 102 TFEU in their entirety. Before the reforms, only the Commission was empowered to grant exemptions under Article 101(3), making it difficult for national courts to conclusively rule on a case. If the national judge took the view that individual exemption was possible in the case, s/he was meant to suspend the proceedings until the Commission had made a decision, whilst being free to adopt interim measures in the meantime. Where the Commission closed proceedings by ‘comfort letter’ to the parties rather than by a formal decision, the national court was not formally bound but had to take that letter into account in determining whether the agreement or conduct in question infringed what is now Article 101.³³ To minimise divergence in the decentralised application of Articles 101 and 102 (and especially the exempting conditions under 101(3)), the convergence rule mentioned above in relation to the Commission and NCAs (Art 3 Reg 1/2003) also applies to national courts.

Article 15 of Regulation 1/2003, provides for the European Commission’s intervention in national court proceedings. Member State courts may ask the European Commission for information or for its opinion on questions concerning the application of the EC competition rules (15(1)). The European Commission and national competition authorities may also make own-initiative written interventions, and oral submissions with the permission of the judge, in legal proceedings between private parties (15(3)). Chapter 4 investigates how this tool has been used so far.

The *Masterfoods* CJEU judgment,³⁴ codified in Article 16 of the Regulation, established that where the Commission reaches a decision in a particular case prior to the national court, the court cannot take a decision running counter to that of the Commission. There is also a duty to avoid adopting a decision that would conflict with a decision contemplated by the Commission, which goes further than NCAs’ obligations not to counter an existing decision. This means that where the Commission finds an infringement, it must be treated

³³ Case 99/79 *Lancôme v Etos* (1980) ECR 2511 [11]

³⁴ C-344/98 *Masterfoods Ltd (t/a Mars Ireland) v HB Ice Cream Ltd* [2000] ECR I-11369 [60]

as proof of the existence of the infringement in national court proceedings. An extension of this effect to NCA decisions is also discussed in chapter 5.

***Court of Justice-National Competition Authorities: (potential) preliminary reference procedure**

This relationship is the subject of chapter 3. As discussed above, the preliminary reference procedure is a link between the CJEU and national courts. Article 267 TFEU provides that a 'court or tribunal' may address a reference to the CJEU. 'Court or tribunal' is an autonomous concept of EU law, and does not rely on how an authority is designated in the Member State. This raises the question of whether a competition authority as an executive agency with judicial functions such as ability to find an infringement and to impose fines, has access to the CJEU through the preliminary reference procedure.

***National Competition Authorities-national courts: national law, but EU proposals affect this relationship**

Aspects of this relationship are discussed in chapter 5. It is important to distinguish the different capacities of national courts in competition law enforcement. They may act in a public enforcement role as a designated competition authority;³⁵ as civil courts called upon to apply the competition rules in disputes between parties in private enforcement; or as appeal or review courts. The relationship between a national competition authority and court within the same Member State is largely a matter for national law. However, some EU obligations do impinge on this relationship.³⁶ For example, Art 15 Reg 1/2003 confers on NCAs, as well as the Commission, the possibility to intervene in their domestic jurisdiction in court cases between private parties on issues relating to the application of Art 101 or 102 TFEU. National rules must facilitate this possibility. In addition, the White Paper on damages actions includes a proposal for the cross-border binding effect of NCA decisions on civil courts throughout the EU: the focus of chapter 5.

³⁵ Under Art 35 Reg 1/2003 "Member States shall designate the competition authority or authorities responsible for the application of Articles [101] and [102] of the Treaty in such a way that the provisions of this regulation are effectively complied with.... The authorities designated may include courts."

³⁶ See e.g. the recent Belgian case of *VEBIC*, C-439/08 *Vlaamse Federatie van Verenigingen van Brood-en Banketbakkers, Ijsbereiders en Chocoladebewaterkers (VEBIC) v Raad voor de Mededinging, Minister van Economie* [2010] ECR I-0000, in which the CJEU found that national law is contrary to EU law if it does not give an NCA the possibility to participate in review proceedings against its own competition decisions.

6. Outline of the thesis

Chapter 2 lays the basis for the case studies in the subsequent three chapters by exploring the relatively new concept of interpretative pluralism, linked with the established EU principle of institutional balance. Interpretative pluralism suggests that there is a heterarchy, rather than a hierarchy, of interpretations of law in the EU system. This is relevant in a system of concurrent competences such as in the post-2004 competition enforcement regime, in which consistent application of the rules is important for the effectiveness of the system, but various courts and administrative authorities with quasi-judicial functions enforce the law and have different claims to authority. The principle of institutional balance is the EU's version of the separation of powers at the supranational level, but the functions of legislative, executive and judiciary are not vested in respective single institutions. It is questionable whether there can be a 'diagonal' institutional balance between the supranational and the national levels, which activates the judicial autonomy of Member State courts. However, there is a duty of loyal cooperation between the EU institutions and authorities and courts at the sub-state level.

Chapters 3-5 are the case studies exploring the effects of tools for coherence on the interactions between courts and administrative authorities. Chapter 3 considers the diagonal relationship between national competition authorities and the Court of Justice through their (lack of) access to the Court's preliminary reference procedure under Art 267 TFEU. The preliminary reference procedure is important as the primary means for encouraging coherence of EU law through the CJEU's interpretation. It first sets the context by surveying the post-2004 landscape of EU competition law enforcement, in particular multiple enforcers and the challenge of consistent application of antitrust rules in decentralised enforcement; and the quasi-judicial nature of competition enforcement undertaken by these multiple enforcers. It goes on to consider the Member States' designation of institutional structures for public enforcement of competition law under Article 35 Regulation 1/2003 and assesses the significance of these designations for obligations under Reg 1/2003. Then the discussion turns from the designation of courts or administrative agencies as competition authorities at the national level, to the criteria in the EU's autonomous definition of a 'court or tribunal' for the purposes of the preliminary reference procedure. It considers how the CJEU including its Advocates General have defined and developed the concept through specific, albeit occasionally flexible, criteria. These criteria are important for determining which national bodies have access to the CJEU's advice and interpretation of the law. Of particular relevance are the need for the referring body to have an inter partes procedure i.e. to be a third party

adjudicator between the parties, to be independent, and to have compulsory jurisdiction leading to a decision of a judicial nature.

The chapter focuses on the *Syfait* case³⁷ in which the Greek Competition Commission, as a competition authority with integrated investigative and adjudicative functions, addressed a reference to the CJEU but was ultimately refused. The chapter analyses whether the judgment bars all NCAs from access to the CJEU. The analysis focuses on first the CJEU's interpretation of the independence criterion and secondly the Court's reasoning that the Commission may always potentially relieve an NCA of its competence under Article 11(6) Regulation 1/2003, implying that proceedings initiated before the NCA will not necessarily culminate in a 'decision of a judicial nature'. In practice this latter criterion could bar references from all NCAs, since they are all subject to Art 11(6) within the European Competition Network. The chapter argues that the CJEU's judgment was flawed as the effects of Art 11(6) apply only to the prosecuting authority, according to Art 35(4) Regulation 1/2003. In addition the Commission had not in practice activated Art 11(6). However, even if the legal argument can be made for the Court to accept preliminary references from NCAs, it is argued that the message sent in *Syfait* has effectively frozen them and the Court has curtailed its own jurisdiction.

There is certainly a bias towards dualist NCAs i.e. those which separate their investigative and decision-making functions. Integrated administrative NCAs, the most prevalent NCA model in the EU, have an extra hurdle to overcome because they do not have the structural separation of functions required to meet the independence requirement. As a result they do not have the same opportunity to seek guidance from the CJEU. A consequence of this is uneven access to the judicial tool of the preliminary reference procedure, dependent on institutional structure.

As a result, Chapter 3 finds that there are asymmetric avenues to the supranational level for national courts and competition authorities. From the CJEU's perspective, it seems motivated to preserve its dialogue between courts only and to exclude quasi-judicial NCAs with integrated functions. This may be to manage its own caseload. However, if the CJEU adopts a narrow definition of a court or tribunal, it constrains its own jurisdiction. By emphasising in *Syfait* that NCAs are required to work in close cooperation with the Commission in the context of the European Competition Network, the CJEU effectively

³⁷ C-53/03 *Synetairismos Farmakopion Aitolias & Akarnanias (Syfait) v GlaxoSmithkline Plc* [2005] ECR I-4609

passes over responsibility to the Commission for how NCAs should interpret and apply competition law.

Meanwhile, the European Commission, as a supranational administrative authority with quasi-judicial functions, has extended its sphere of influence by strengthening its links with national courts. Chapter 4 investigates this other diagonal relationship. Previously, the Court of Justice's preliminary reference procedure, a 'dialogue between courts', was the only formal link between the courts of the Member States and the supranational level. Chapter 4 shows how the European Commission has added to this general (EU law) institutional link through the specific (to competition law) instrument of opinions and own-initiative interventions to national courts in competition cases, under Art 15 Reg 1/2003. This is placed within the context of the broader relationship between the European Commission and national judges in EU competition law through case law, in particular the effect of Commission decisions and other pronouncements on national courts. Informed by original research into the legislative background of Art 15 Reg 1/2003, it explains how this tool is designed in the absence of a formal judicial network to promote consistent application following decentralisation. Chapter 4 argues that this raises constitutional questions about the effect of concurrent competences on the institutional balance at the supranational level between the Commission and the Court of Justice, and diagonally in terms of the effect on national judicial autonomy.

The discussion takes both a theoretical and a practical approach. Through the soft law literature, the theoretical element examines the legal nature of the Commission opinion as an EU instrument. It argues that the Commission's opinion in this context is a unique instrument and as such its legal effects are uncertain. It does not fit easily into the category of soft law instruments establishing 'rules of conduct.' However, it could become binding through the national court's judgment. After exploring the theoretical context, the chapter contributes original research on how Art 15 works in practice. It seeks to trace all of the opinions and own-initiative interventions to date. The chapter reports 23 opinions under Art 15(1) and 9 interventions under Art 15(3), with varying degrees of success in identifying the parties and how the opinion was dealt with by the national court. The chapter finds a de facto third category between Art 15(1) and 15(3): cases in which the Commission was 'invited' to intervene but no specific questions were put to it. In relation to Art 15(3), the chapter discusses the Commission's reason for intervention (where this can be observed) and whether the national judge followed the Commission.

The preliminary ruling in *X BV* is analysed in detail, as it relates to the admissibility of Art 15(3) interventions. The CJEU's response gives the Commission wide scope to intervene in a national court case related to the effective application of Articles 101 and 102 TFEU, even if the court is not directly applying them. Chapter 4 finds that the case suggests an emphasis on *effective* – not only coherent - application of the EU rules, and that it implies that a Commission intervention could extend to national cases concerning, for example, contract disputes, follow-on damages actions, or criminal proceedings - not initially intended by Regulation 1/2003.

Chapter 4 calls for transparency through the publication of observations, ideally in different language versions. Some interventions are available on the Commission's website, but they are not formally published, for example in the Official Journal. The Commission has made available most of its own-initiative observations. These are the cases in which it has felt compelled to intervene, and so represent competition issues which it finds to be most important for coherent application. As such it is in the Commission's interest to publish them. By contrast, only around a quarter of the opinions requested by national courts under 15(1) have been publicised. This lack of transparency raises questions about the 'back door' influence of these opinions in the judicial proceedings. Publication would contribute to legal certainty and consistent application throughout the EU, also by promoting awareness among judges of cases in other Member States.

Art 15(3) Reg 1/2003 also allows national competition authorities to intervene in national judicial proceedings in their *own* Member State. Together with the proposal discussed in chapter 5, that could bring national courts indirectly into the European Competition Network. That could have positive benefits for the consistent application of the EU competition rules, but also brings judicial autonomy into question. Chapter 5 discusses the proposal in the forthcoming EU directive on damages actions to introduce the binding effect of national competition authorities' decision on national courts throughout the EU. The chapter first explains the context of the rule - to incentivise claimants to bring private enforcement cases in civil courts by alleviating their burden to prove an infringement – and its scope. It then goes on to highlight its much broader constitutional significance in terms of the interaction between judicial and administrative institutions and their decisions. It argues that the proposed rule creates an apparent hierarchy of administrative decisions over court judgments, narrowing the field of civil courts' jurisdiction. It also implies a certain burden on judges: that civil courts must be aware of all NCA infringement decisions throughout EU - and show that they are taken into account in their reasoning.

This chapter demonstrates the asymmetric effects deriving from the status of civil courts and national competition authorities. NCA decisions would be binding on national courts, but there would be no similar horizontal binding effect on fellow NCAs within the European Competition Network. The assumption is that a hard rule binding NCA with each other's decisions is not needed given the cooperation rules within the ECN, but there is no guarantee that the ECN will continue to operate according to these rules. There are also possible uneven effects concerning Member States' courts being bound by decisions of a foreign NCA but not by those of the domestic NCA.

The chapter considers the basis for this rule. Explicitly, it is an extension of *Masterfoods*, which obliges EU Member State courts not to make a ruling running counter to one made or contemplated by the European Commission. As such the chapter revisits the different understandings of *Masterfoods*. The chapter argues that the binding effect rule could be understood as a delegation, or devolution, of the Commission's enforcement powers. But if national courts are also EU courts, in the system of concurrent competences, national judges' interpretation of EU law is as valid as the Commission's, and by extension an NCA's.

The chapter also examines the horizontal duty of loyal cooperation between sub-state bodies, and the analogy with the Brussels I Regulation on jurisdiction and recognition of judgments between Member States. It argues that the binding effect rule should have at least the same safeguards as Art 34(1) Brussels Reg, which would allow a civil court to refuse to recognise an authority's decisions in exceptional circumstances. If this were not the case, decisions of administrative bodies would be afforded a privileged position relative to judgments of civil courts – another example of asymmetric effects. However, questioning other Member States' compatibility with fair legal process standards may undermine trust currently fostered in the ECN.

The chapter concludes with an assessment of the possibility of the rule being adopted, including issues surrounding legal base of the directive and views in the Member States. The proposal clearly has benefits in terms of alleviating the burden of proof on claimants seeking redress for competition damages. However, currently the only Member State to impose the binding effect of foreign NCA decisions is Germany. In a number of Member States there would need to be constitutional reform for the rule to be adopted. The chapter suggests that one way around this may be a semantic one – packaging the finding

of infringement as an 'irrebuttable presumption' as at least a symbolic gesture to independence of the judiciary. In particular, the word 'binding' should be avoided.

Chapter 6 concludes by arguing that national courts should develop their horizontal relationships, both to promote coherent application of EU competition law and to safeguard their own autonomy. It also identifies directions for future research.

CHAPTER 2: INTERINSTITUTIONAL THEMES

1. Introduction

This chapter lays the basis for the case studies to follow. The thesis explores interaction between courts and administrative authorities in the post-2004 EU competition law enforcement regime. This chapter therefore discusses the significance of coherence in the system, the concept of interpretative pluralism in a system of concurrent competences, and how this relates to the European Union principle of institutional balance.

The thesis explores these institutional interactions by investigating the operation of tools for coherence in the decentralised system. Consistent application of the competition rules is important given the centrality of competition to the internal market. However, a system of concurrent competence suggests that all institutions' interpretations of the law are valid. The chapter therefore takes forward the understanding of the concept of interpretative pluralism in this specific context. Interpretative pluralism would suggest a looser interpretation of unity or coherence.

Any discussion of the relationships between institutions and types of authority also needs to acknowledge the principle of institutional balance, the EU's version of the separation of powers. At the EU level, the legislative, executive and judicial functions are not vested in respective single institutions. The thesis focuses particularly on the judicial and executive functions, and judicial functions carried out by executive agencies. The Court of Justice of the European Union is responsible for the overall unity of EU law. However, in competition law the European Commission's role has been central. As the thesis also explores the diagonal relationships between courts and administrative authorities between the supranational and national levels, it must also be asked whether a diagonal institutional balance is possible. The closest to this is the mutual duty of loyal cooperation in EU law. This links back to interpretative pluralism, according to which institutions should accommodate each other. As coined by Maduro, it means that courts do not have a monopoly on the interpretation of the law and that no one institution needs to have the last word. The case studies to follow in subsequent chapters investigate the plausibility of this idea. They also respond to Komarek's observation that research into courts' deference to administrative agencies' interpretation of the law "seems to be entirely missing in the EU."¹

¹ J Komarek 'Institutional Dimension of Constitutional Pluralism', in M Avbelj & J Komarek (eds) *Constitutional Pluralism in Europe and Beyond* (Hart 2011) 231-247, 235

The chapter first considers the EU principles of institutional balance, and of loyal cooperation. It then considers the (judicial) function of norm interpretation and precedent setting in safeguarding different types of coherence, and the CJEU's and Commission's concurrent functions. This includes a consideration of soft law. Finally the chapter discusses interpretative pluralism.

2. The EU Principle of Institutional Balance

Institutional balance is a fundamental constitutional principle as affirmed by the Court of Justice in the *Chernobyl* case: "Observance of the institutional balance means that each of the institutions must exercise its powers with due regard for the powers of the other institutions."² However, its content is not entirely clear, as Lenaerts & Verhoeven note.³ This is because the EU's institutional balance does not rest on an organic separation of powers with each institution having one function of legislature, executive or judiciary.⁴ That means that different institutions share functions – such as the Commission and the Court on the supranational level. There is a "*partial* exercise of the power of one branch by another."⁵ In the EU, "the classic constitutional frontiers between executive/legislative/judicial power [are blurred]".⁶ Discussions of institutional balance take in the evolving roles of the EU institutions and in particular the European Parliament, with the Court of Justice as an adjudicator of the balance - but not as an institution whose powers should be taken into account within it. It is assumed that the Court guards the institutional balance,⁷ but that its own judicial role does not need to be balanced or protected.

One understanding is that this is based on a balanced interaction between representatives of various *interests*.⁸ First introduced by Pescatore, this means that the EU institutions each encapsulate legislative, executive and judicial functions and therefore derive their

² Case 70/88 Parliament v Council [1990] ECR I-2041 [21]-[22], also known as the Chernobyl case

³ K Lenaerts & A Verhoeven 'Institutional Balance as a Guarantee for Democracy in EU Governance' in C Joerges & R Dehousse (eds) *Good Governance in Europe's Integrated Market* (OUP, 2002) 35-88, 35

⁴ See e.g. K Lenaerts 'Some Reflections on the Separation of Powers in the EC' (1991) 28 *Common Market Law Review* 11-35; S Smismans 'Institutional Balance as Interest Representation' in C Joerges & R Dehousse (eds) *Good Governance in Europe's Integrated Market*, 89-108, 94; Lenaerts & Verhoeven (2002), 47

⁵ G Conway 'Recovering a Separation of Powers in the European Union' (2011) 17 *European Law Journal* 304-322, 319

⁶ A Vauchez 'Political Sociology of the European Community of Law: Elements of a Renewed Research Agenda', EUI WP RSCAS 2007/23, 6.

⁷ E.g. J-P Jacqué 'The Principle of Institutional Balance' (2004) 41 *Common Market Law Review* 383-392, 385

⁸ Lenaerts & Verhoeven (2002) 42.

legitimacy from four types of interests: the common interest, the States, judicial values and popular forces.⁹ This interests-based approach allows consideration of different EU governance structures, such as networks, which may operate outside the traditional roles of the EU institutions.¹⁰ In this understanding, checks and balances are created by “dividing up power by creating different institutions which control each other via necessary *cooperation*.”¹¹

In the light of these governance structures, it could seem that the traditional separation of powers is outdated. However, it is not clear how these different interests should be mediated, or conflicts resolved between them. Conway argues that the concept of separation of powers is still important. The principle of institutional balance is too loosely defined and there is no way of determining its correct application.¹² An examination of institutional balance means “weighing the exercise of functionally undefined power by one institution with its exercise by another.”¹³ This becomes more complex where there are layers of institutions performing overlapping roles. This affects accountability. The Court of Justice’s first reference to the principle of institutional balance in *Meroni*¹⁴ suggested that the principle was “not only to maintain the divisions of powers between the institutions, but also to protect the interests of private individuals”.¹⁵ This is relevant to individuals and firms in competition law, if one institution takes over the function of another.

⁹ P Pescatore ‘L’exécutif communautaire: justification du quadripartisme institutionnel’ (1978) 4 *Cahiers de Droit Européen*, 394, quoted in A Vauchez ‘Political Sociology of the European Community of Law: Elements of a Renewed Research Agenda’, EUI WP RSCAS 2007/23, 6. See also D Halberstam, who posits that “Different authorities make claims based on voice (representation of relevant political will), expertise (knowledge or instrumental capacity to decide upon a particular issue) and protection of rights. ‘Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States’ in J Dunoff and J Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Government* (CUP, 2009), drawing from Ackerman’s identification of principles motivating the modern doctrine of separation of powers: B Ackerman ‘The New Separation of Powers’, (2000) 113 *Harvard Law Review* 633, 634: ‘democracy, professionalism [what could also be understood as expertise], and the protection of fundamental rights.’

¹⁰ G De Búrca, ‘The Institutional Development of the EU: a Constitutional Analysis’, in P Craig and G de Búrca (eds), *The Evolution of EU Law* 1st edn (OUP, 1999), at 57-60 and 73-75.

¹¹ S Smismans ‘Institutional Balance as Interest Representation’ in C Joerges & R Dehousse (eds) *Good Governance in Europe’s Integrated Market*, 89-108, 94 (emphasis added)

¹² G Conway ‘Recovering a Separation of Powers in the European Union’ (2011) 17 *European Law Journal* 304-322, 319

¹³ Conway (2011) 319

¹⁴ Case 9/56 *Meroni v High Authority of the European Coal and Steel Community* [1958] ECR 133, 152: “in the balance of powers which is characteristic of the institutional structure of the Community [inferred from Art 3 EEC is] a fundamental guarantee in particular to the undertakings and associations of undertakings to which it applies.” The Community’s objectives set out in Art 3 EEC are binding on “the institutions of the Community ... within the limits of their respective powers, in the common interest”.

¹⁵ J-P Jacqué ‘The Principle of Institutional Balance’ (2004) 41 *Common Market Law Review* 383-392, 385

In a federal context, separation of powers can refer to vertical distribution of power between a central government and its sub-national governments.¹⁶ In the EU context, this would be between the supranational and Member State levels.¹⁷ However, there is no disaggregation between the different branches of State at those two levels, and the diagonal relationships between them. At the enforcement and implementation level, the Member States (and their component institutions, such as courts and competition authorities) acting on behalf of Union interests, through the duty of loyal cooperation, are more involved in the exercise of the executive and judicial functions. This is a case of executive federalism, allocating legislative power to the supranational level and executive power to the national levels. In competition law, this is made more complicated as legislative/executive/judicial power is also retained by the Commission at the supranational level. As Lenaerts states, “each power can fulfil its tasks in an *efficient* way only when at least one other power *cooperates* to its effect”.¹⁸ This focus on efficiency and cooperation is pertinent in the case of concurrent powers in the competition enforcement system. There needs to be communication between institutions – this is discussed further below in the discussion of interpretative pluralism.

A key question is how the institutional balance plays out where institutions with different functions interact between the supranational and national levels i.e. can there be a ‘diagonal’ institutional balance? The closest thing to this is the mutual duty of loyal cooperation.

3. Diagonal institutional balance? The duty of loyal cooperation

The duty of loyal, or sincere, cooperation in Art 4(3) TEU (ex Art 10EC)¹⁹ is concentrated on the EU and its Member States assisting each other. One aspect of this is the vertical

¹⁶ D Halberstam ‘Comparative Federalism and the Role of the Judiciary’ in K Whittington, D Kelemen & G Caldeira (eds) *The Oxford Handbook of Law and Politics* (OUP, 2008) 142-164

¹⁷ J Weiler ‘The Community System: the Dual Character of Supranationalism’ *Yearbook of European Law* (1981) 257-306 (a) normative supranationalism: relationship and hierarchy between policies and legal measures at EU and Member State level (*executive dimension*) (b) decisional supranationalism – institutional framework and decision-making (*legislative/judicial dimension*)

¹⁸ K Lenaerts ‘Some Reflections on the Separation of Powers in the EC’ (1991) 28 *Common Market Law Review* 11-35, 11

¹⁹ “Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives.” The previous version in Art 10 EC focused on the obligation of the Member States towards the Union, rather than a mutual duty: “Member States shall take all appropriate measures,

nature of the duty, between the Union institutions and the Member States. However, loyal cooperation also implies a horizontal element - the duties of Member States to assist each other in carrying out tasks which flow from the Treaties.

The duty of loyal cooperation Art 4(3) TEU is the basis of a possible diagonal institutional balance. This is on the basis that the duty is not only between Member States themselves and the EU institutions, but extends to sub-state bodies²⁰. The duty is not a stand-alone one, and must be used in conjunction with another provision. In competition law this would emanate from Art 4(3) TEU and the Treaty competition rules, and Regulation 1/2003. This would suggest a vertical relationship (EU-national), and diagonal in the sense of the national level being disaggregated into institutions such as national courts. Vertically this would relate to the relationship between national administrative authorities and the Commission, and between national courts and the CJEU. Diagonally this would relate to the relationships between the Commission and national courts and between the CJEU and NCAs. This is discussed more fully in chapters 3 and 4. But the duty of loyal cooperation could also indirectly give rise to horizontal links (national-national), for example between NCAs and national courts. This is discussed further in chapter 5.

First, the vertical/diagonal relationship. The duty of loyal cooperation suggests that institutions have their own territories and competences and that there needs to be an acknowledgement of each other's functions. The duty of loyal cooperation in competition law specifically was established in the CJEU's *Delimitis* judgment.²¹ *Walt Wilhelm*²² had previously concerned a conflict between national and Community substantive competition laws, and possible double jeopardy in breach of both systems of law; whereas *Delimitis* was a case of potential institutional, rather than substantive divergence. *Delimitis* concerned a conflict between national court and Commission proceedings both applying EU competition law, and created an obligation of cooperation for national courts not to adopt a decision contrary to one of the European Commission, later developed in *Masterfoods*²³. Raising the separation of powers, Ehlermann questions whether *Delimitis*

whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.”

²⁰ There is a duty on national courts and on other national authorities to disapply national rules which are incompatible with EU law – respectively, 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629 and C-103/88 *Fratelli Costanzo v Milano* [1989] ECR 1839. For a discussion of specific duties see J Temple Lang 'The Duties of National Authorities under Community Constitutional Law'. (1998) 23 *European Law Review* 109

²¹ C-234/89 *Delimitis v Henninger Bräu* [1991] ECR I-935

²² Case 14/68 *Walt Wilhelm v Bundeskartellamt* [1969] ECR 1

²³ C-344/98 *Masterfoods Ltd (t/a Mars Ireland) v HB Ice Cream Ltd* [2000] ECR I-11369

deference still holds where the Commission no longer has a monopoly over Art 101(3) TFEU in the post-2004 regime.²⁴

Some have explicitly ruled out such a ‘diagonal’ separation of powers.²⁵ However, this rather one way expression of the duty of loyal cooperation in *Delimitis* was explicitly expanded to a two-way, mutual, duty in *Zwartveld* and later enhanced by *First Franex*, underlining the reciprocal duty of the EU institutions to cooperate with national courts.²⁶ These cases express the extent of the Commission’s, rather than national authorities’ or courts’, obligations. However, it is arguable that the Commission’s responsibility is not necessarily based on its duty as a supranational institution, but on its expertise.

In an expression of this mutual duty of loyal cooperation, the Commission should give priority to cases which have been stayed by national courts pending the Commission’s investigation.²⁷ This links with the idea of the institutional balance as cooperation to perform tasks in an efficient way. On the basis of Article 4 TEU, if a national court needs information that only the Commission can provide, the Commission has a duty to provide that information as soon as possible if requested. However, the Commission may refuse to transfer information where there is a “need to preserve the *interests of the Community*, or to avoid *interference with the Commission’s functioning and independence* in particular by jeopardising the accomplishment of the tasks entrusted to it”.²⁸ This reflects the interests-based approach to institutional balance, but also the organic independence of the Commission.

On the horizontal nature of the duty of loyal cooperation in competition law, specific horizontal duties between NCAs are given expression through the European Competition

²⁴ C-D Ehlermann, in ‘Panel Discussion Three: Courts and Judges’ *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Hart, 2001), 518

²⁵ E Paulis ‘Coherent Application of EC Competition Rules in a System of Parallel Competencies’ in C-D Ehlermann, and I Atanasiu (eds) *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Hart, 2001) 399-428 – perhaps unsurprisingly as a Commission official responsible for the 2004 reforms.

²⁶ C-2/88 *Zwartveld* [1990] ECR I-3365; C-275/00 *European Community v First NV and Franex NV* [2002] ECR I-10943; C Brown & D Hardiman ‘The Extent of the Community Institutions’ Duty to Co-operate with National Courts – *Zwartveld* revisited’ (2004) 25 *European Competition Law Review* 299-304. In *First and Franex*, the duty to provide information was expanded not only where the national court applied EU law, but where national liability is concerned - in that case, ascertaining liability of the Belgian authorities. *First & Franex* asked the Belgian Court to *require* the Commission to appear before an expert committee making findings on damage arising from the Belgian dioxin crisis for the purposes of quantification and compensation. The rationale for this is that there is a duty when applying national law to guarantee the effectiveness of EU law – that is, national law is the channel for EU application.

²⁷ Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, OJ C 101, 27.4.2004, 54-64 [12]

²⁸ *Zwartveld* [10]-[11], *First Franex* [49], T-353/94 *Postbank v Commission* [1996] ECR II-921 [93] - references from the Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, OJ C 101, 27.4.2004, 54-64 [26].

Network. Cooperation between national competition authorities and national courts is primarily a matter of national law. However, the relationship could be subject to a horizontal duty of loyal cooperation where EU law is applied, and in cross-border matters.²⁹ This is discussed further in chapter 5 on the effects of NCA decisions on national courts. This horizontal duty is likely to be tested in the case of follow-on private damages actions.³⁰

As noted above, there is no way to resolve clashes of competence and preserve coherent interpretation of the law in these diagonal relationships. This raises the concept of interpretative pluralism in a system of concurrent competences, discussed below. Courts do not have a monopoly on the interpretation of the law. This raises the question of judicial versus executive power. In competition law, executive powers between the supranational and national level are well linked through the European Competition Network, as an example of an integrated administration.³¹ However, there are no organised horizontal links between courts. The only vertical link is with the CJEU's preliminary reference procedure. This militates in favour of executive, rather than judicial, power. This is made more complicated by the different capacities of courts in the competition system. They can be called upon to apply the law directly in disputes between private parties (private enforcement of competition law); they can be designated national competition authorities in a public enforcement function; or they can act in a judicial review function. As well as having implications for consistent application of rules, this lack of judicial links to match those of the executive between the supranational and national levels gives rise to an "accountability gap" between the different degrees of integration of the legislative, executive and judicial branches.³² This is all the more important in a system where executive agencies also exercise some judicial functions.

²⁹ J Temple Lang 'The Duties of National Authorities under Community Constitutional Law' (1998) 23 *European Law Review* 109; J Temple Lang 'The Duties of Co-operation of National Authorities and Courts under Article 10EC – Two More Reflections' (2001) 26 *European Law Review* 84-93

³⁰ As demonstrated in the recent case of C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-0000, where the Court of Justice ruled that information obtained during a leniency application to a competition authority is not precluded from being disclosed to a claimant in private enforcement proceedings.

³¹ H Hofmann & A Türk 'The Development of Integrated Administration in the EU and its Consequences' (2007) 13 (2) *European Law Journal* 253-271, and in H Hofmann 'Constitutionalising Networks in EU Public Law' (2009) University of Luxembourg Working Paper No 2009-06

³² I Maher & O Ştefan 'Competition Law in Europe: The Challenge of a Network Constitution' in D Oliver, T Prosser & R Rawlings (eds) *The Regulatory State: Constitutional Implications*, (OUP, 2010), 178-199, 199

4. Judicial functions and coherence

In any system of law, but particularly in the context of EU law, emphasis is placed on coherence.³³ The degree of coherence is dependent upon courts: in the EU, “systemic coherence and effectiveness have depended on how the CJEU and the national courts have negotiated their relationship with one another.”³⁴ Courts achieve this through rulings³⁵, “a legal system is coherent if its components fit together, either all of them (global systemic coherence) or some of them (...local systemic coherence)”³⁶. In the context of this thesis, global coherence would relate to the body of EU law as a whole, and systemic coherence to EU competition law as a particular branch of law, a subset of EU law. There is also the single case level. In competition law, there are concurrent competences at two levels: on a systemic level between the Commission and the Court of Justice; and at case level between the Commission, national authorities and national courts.

On the global level, the Court of Justice’s primary concern is for coherence in the EU legal order as a whole. The traditional role of the CJEU is to safeguard uniform interpretation and application of EU law throughout the Member States. The CJEU “has been concerned to secure not just uniformity of application of EU law but also an *interpretive* unity”³⁷ on the grounds that “every EU provision should be given a uniform interpretation, irrespective of the circumstances in which it is to be applied, in order to forestall *future* differences in interpretation”.³⁸ [emphasis added].

The archetypal way to achieve this is through the preliminary reference procedure, linking it with national courts: “Article [267 TFEU] is essential for the preservation of the Community character of the law established by the Treaty and has the object of ensuring

³³ According to Moral Soriano, one approach of CJEU judges is “not [to] seek to determine *what the law is* according to the criterion of coherence, but, rather, they try to make the legal system (the existing law and previous decisions) a coherent unit (or whole).” (emphasis in original). L Moral Soriano ‘A Modest Notion of Coherence in Legal Reasoning: A Model for the European Court of Justice’ (2003) 16(3) *Ratio Juris* 296-323, 298

³⁴ A Stone Sweet ‘The European Court of Justice and the Judicialization of EU Governance’ *Living Reviews in European Governance* vol 5 (2010), Ireg-2010-2, 29

³⁵ Or ‘normative adjudicative coherence’. For a discussion of different types of coherence in legal philosophy and their operation in the case law of the Court of Justice, see S Berteau ‘Looking for Coherence within the European Community’ (2005) 11(2) *European Law Journal* 154-172; N McCormick *Legal Reasoning and Legal Theory* (Clarendon, 1979); A Schiavello ‘On “Coherence” and “Law”: An Analysis of Different Models’ (2001) 14(2) *Ratio Juris* 233-43, 236

³⁶ S Berteau ‘Looking for Coherence within the European Community’ (2005) 11(2) *European Law Journal* 154-172, 157

³⁷ D Chalmers, G Davies & G Monti, *European Union Law*, 2nd edn (CUP, 2010), 161

³⁸ Discussed in relation to C-297/88 & C-197/99 *Dzodzi v Belgium* [1990] ECR I-3673

that in all circumstances this law is the same in all States of the Community.”³⁹ The national courts in turn have a role in coherent application of the law in the domestic setting. This includes reconciling national provisions with EU law. They should do this by interpreting national law in line with EU law as far as possible⁴⁰ and by disapplying national rules which are incompatible with EU law.⁴¹ This underlines the role of courts in ensuring coherence.

However, as Berteau observes, “...the pluralist nature of the Community sits poorly with the idea of unity”⁴². This pluralist idea of unity is relevant to interpretative pluralism discussed below. Whereas uniformity suggests only one result, coherence is a matter of degree. On a practical level, it becomes important when investigating the operation of the tools in competition law for ‘uniform’, ‘coherent’ or ‘consistent’ application of the rules, as discussed in the later chapters.

Coherence is important because “[a]ny weakening, *even if only potential*, of the uniform application and interpretation of Community law throughout the Union would be liable to give rise to distortions of competition and discrimination between economic operators, thus jeopardizing equality of opportunity as between those operators and consequently the proper functioning of the internal market.”⁴³ [emphasis added]. Therefore coherence is explicitly linked to the effectiveness of competition at the heart of the internal market – the link between the global and the system level.⁴⁴ In the context of competition enforcement, “in a system of parallel powers it is thus crucial to ... design rules to prevent conflicts between *courts of different fora* and between *courts and competition authorities*,

³⁹ Case 166/73 *Rheinmühlen-Diüsseldorf v Einfuhrund Vorratsstelle für Getreide und Futtermittel* [1974] ECR 33 [2]

⁴⁰ C-106/89 *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] ECR I-4135

⁴¹ Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629

⁴² S Berteau ‘Looking for Coherence within the European Community’ (2005) 11(2) *European Law Journal* 154-172, 155

⁴³ Report of the Court of Justice on certain aspects of the application of the Treaty on European Union, Luxembourg, May 1995, europa.eu.int/en/agenda/igc-home/eu-doc/justice/cj_rep.html, point 11, cited in J Komarek, ‘Federal Elements in the Community Judicial System: Building Coherence in the Community Legal Order’ (2005) 42(1) *Common Market Law Review* 9-34, 9

⁴⁴ As an example of the link between global and systemic coherence, the *Crehan* and *Manfredi* judgments, establishing a Community right to an effective remedy for breach of Community competition rules, can also be viewed in terms of global coherence of the system, as they echo *Francovich*-style wording: C-453/99 *Courage Ltd v Bernard Crehan*, ECR [2001] I-6297 [26]; C-295/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA*, ECR [2006] I-06619 [61]; C-6/90 *Francovich and Others v Italian Republic* [1991] ECR I-5357 [33] “The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain reparation when their rights are infringed by a breach of Community law “

as well as to define precisely the domains of application of, respectively, *national and E[U] competition laws*. And to ensure that E[U] competition laws are applied *in the same way*.”⁴⁵

The CJEU’s emphasis is on global coherence (of EU law as whole), including systemic coherence (of competition law as a central part of the single market). At the system level, the Commission has a legislative role in issuing guidelines and notices, but these instruments also serve a judicial – interpretative – function. The Commission’s judicial function at the systemic level comes about through soft law, discussed below. It can establish the rules and elucidate its interpretation of EU law through notices and guidelines.

Within competition law, Gerber and Cassinis also refer to systemic and single case levels, where systemic consistency is consistency in outcomes among different cases within the system and single case consistency refers to treatment of a single set of facts by multiple institutions.⁴⁶ Competition enforcement is characterised by agencies with quasi-judicial functions.⁴⁷ At the single case level, the Commission and competition authorities have adjudicative powers. They can make a finding of (no) infringement, an order to terminate certain behaviour, or impose a fine or sanction. As well as acting as investigator, and prosecutor,⁴⁸ the European Commission is “initial judge” (in the sense of first instance judge) with regard to Treaty infringements.⁴⁹ However, other elements of the traditionally judicial functions, such as norm interpretation and precedent setting, have been less explored.

⁴⁵ K Lenaerts and D Gerard ‘Decentralisation of EC Competition Law: Judges in the Frontline’, (2004) 27(3) *World Competition* 313-349, 316

⁴⁶ D Gerber & P Cassinis ‘The “Modernisation” of European Community Competition Law: Achieving Consistency in Enforcement – Part I’ (2006) 27(1) *European Competition Law Review* 10-18, 14

⁴⁷ Appendix on the classification of functions in J Sterling, A Le Sueur, S De Smith, L Woolf, J Jowell *De Smith, Woolf and Jowell’s Judicial Review of Administrative Action* (Sweet & Maxwell, 1995), 831: “whether the performance of the function terminates in an order that has conclusive effect (does a decision have the force of law without needing to be confirmed or adopted by another authority?), or whether the process has certain formal or procedural attributes (has the decision-making body been endowed with the “trappings of court”: does it determine matters in cases initiated by parties? does it normally sit in public? Can it compel the attendance of witnesses? Can it impose sanctions and enforce the obedience of its own command?). Does the tribunal, in making its decision, also interpret, declare and apply the law?”

⁴⁸ See, for example, W Wils, ‘The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis’ (2004) 27(2) *World Competition* 201-224

⁴⁹ Craig & de Burca (P Craig and G de Burca, *EU Law: Text, Cases and Materials* (OUP, 3rd edn, 2002), 56) characterise this as one of the Commission’s two judicial powers: the other being to bring actions against defaulting Member States under the Art 258 TFEU infringement procedure. Arguably the latter is better understood as a prosecutor role. Whereas the Commission recommends the level of penalty, it is still the Court of Justice which formally renders judgment.

One way in which coherence is achieved is through precedent. The judge's role is to interpret an individual case within the framework of existing legal decisions and constitutional principles, by following the decisions in cases with similar facts (if necessary distinguishing the current case from earlier ones, expanding or limiting the scope of the earlier decision). In this way the judge both applies precedents from previous cases and creates precedents for the future. EU law does not formally adhere to a doctrine of *stare decisis* as understood in common law systems, in which precedents are authoritative and binding. However, in practice it is recognisable in EU law.⁵⁰ Precedent can be understood more widely, and is not confined to courts: "*stare decisis*, far from being a unique set of rules for judicial decision-making, [i]s in reality only a peculiar terminology for expressing a decision-making strategy followed by all policy-makers".⁵¹

If other bodies are also able to set precedent through their decision-making, this would mean that the only thing differentiating this precedent from that set by courts is the response of those 'bound' by the precedent-setter's decisions. In other words, the legitimacy of the precedent-setting body (the competition authority) and its claim to authority. Precedent defined more broadly gives legal certainty – in particular in the context of competition law, firms are able to adapt their behaviour in line with the signals given by the precedent-setter. This is particularly true in the post-2004 regime in which firms and their legal advisors are required to make their own determination about whether their behaviour is compatible with the law, e.g. deciding whether anticompetitive conduct is justifiable under the conditions of Art 101(3).⁵²

Authorities interpret an individual case within the framework of existing legal decisions and Community law principles, in turn also laying down a decision to be followed in the future, in administrative decision-making. In terms of *applying* precedent, that is following its *own* decisions which it has taken in the past, it is logical and efficient for an agency to rely on experience distilled through its existing decisions, without having to be entirely

⁵⁰ T Koopmans 'Stare Decisis in European Law' in D O'Keeffe, H G Schermers (eds) *Essays in European Law and Integration* (Kluwer, 1982), 11-27; J Komarek, 'Federal Elements in the Community Judicial System: Building Coherence in the Community Legal Order' (2005) 42(1) *Common Market Law Review* 9-34, 15-16. A fuller discussion is found in another version of Komarek's paper, 'Creating a Quasi-Federal Judicial System of the European Communities', (2006) Institute for European Law at Stockholm University paper series, No. 54, 32-40. See also A Arnulf 'Owning Up to Fallibility: Precedent and the Court of Justice' (1993) 30 *Common Market Law Review* 247

⁵¹ M Shapiro (1965) 'Stability and Change...: incrementalism or stare decisis', cited in A Stone Sweet & M Shapiro *On Law, Politics and Judicialization* (OUP, 2002), 91

⁵² Forrester notes that before the 2004 reforms "the Commission mainly pursued cases which it selected as good vehicles for advancing the law. This was especially true as to exemptions, where each individual exemption was a flagship piece of rule-making, setting precedent for the future". I Forrester 'A Bush in Need of Pruning: the Luxuriant Growth of Light Judicial Review' in C-D Ehlermann & M Marquis (eds) *European Competition Law Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart, 2011), 6-7

novel with every case. Precedent-*setting* for the future also sends message to firms, contributing to the deterrence objective of the public enforcement role. In the narrower sense, a finding of fact of the Commission is binding. The binding, or at least persuasive, force of precedent is not only exerted on firms but on courts themselves. It implies that Commission decisions may not only be binding on national courts in the same case with the same parties, but in other cases too.

At the single case level, precedent is set by exemption decisions through harder law, such as block exemption regulations, and Art 101(3) TFEU. On the systemic level some of these precedents are set through soft law, through the Commission's interpretative instruments and guidelines. Soft law is defined as "rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects."⁵³ Their effects are felt by becoming binding through a court judgment, by being mixed with hard legal principles.⁵⁴ This is discussed in more detail in chapter 4.

In the context of the roles of the European Commission assuming judicial functions, regarding the EU competition rules, the Commission and the Court are joint trustees of the Treaty.⁵⁵ Paulis argues that *both* the Commission and the Court of Justice are *jointly* responsible for uniform application of the competition rules.⁵⁶ There are concurrent powers arising outside the area of decision-making - the Commission's power to adopt interpretative instruments and the CJEU's power to interpret Union law.⁵⁷ This implies that the Commission should communicate the CJEU's case law, somehow without giving its own interpretation of it. Snyder postulates that the combination of Art 4 TEU (the duty of loyal cooperation, discussed above) and Art 211 EC⁵⁸ (the power to formulate recommendations and opinions in order to ensure proper functioning and development of

⁵³ L Senden, *Soft Law in European Community Law* (Hart, 2004), 112, developed from F Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' (1993) 56(1) *Modern Law Review* 19-54, 32: "rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects."

⁵⁴ Ștefan explores the CJEU's approach to the Commission's soft law instruments and finds that it embeds competition and State aid soft law through fundamental EU legal principles. These soft law norms are then judicialised and integrated within future decision-making processes and litigation. O Ștefan 'Hybridity Before the Court: A Hard Look at Soft Law in the EU Competition and State Aid Case Law' (2012) 37(1) *European Law Review* 49-69. Snyder, 33, also suggests that a soft law act could become binding if one of the parties in private litigation invokes it.

⁵⁵ A Stone Sweet 'The European Court of Justice and the Judicialization of EU Governance' *Living Reviews in European Governance* vol 5 (2010), Ireg-2010-2, 25

⁵⁶ E Paulis 'Coherent Application of EC Competition Rules in a System of Parallel Competencies' in C-D Ehlermann, and I Atanasiu (eds) *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Hart, 2001) 399-428, 421

⁵⁷ L Senden, 'Soft Law and its Implications for Institutional Balance in the EC' (2005) 1(2) *Utrecht Law Review* 79-99, 93

⁵⁸ No equivalent in the Lisbon Treaty

the Union) “gives the Commission both the *power and the duty to explain* CJEU judgments and spell out their implications for national governments and private parties”⁵⁹ [emphasis added]. However, Snyder does not explain why the Commission needs to act as an intermediary, and why national governments and private parties themselves cannot come to their own view of the implications of a judgment. Such a role as interpreter of the law between the Member States and the Court of Justice gives the Commission the opportunity to restate the law as it sees it and could encroach on the competence of the CJEU.

The use of soft law can affect the institutional balance in the Union. Art 19 TEU⁶⁰ (ex Art 220 EC) suggests that the Court of Justice has a monopoly over interpretation of Union law– or at least the ‘final say’. But the authoring of soft law rules, which flesh out the harder Treaty obligations of Art 101 and 102 TFEU, and their day-to-day application is carried out by the Commission. The Commission’s authorship of these instruments at the legislative level suggests its interpretative supremacy at the enforcement level.⁶¹ Where there is a clash between a soft law instrument and existing case law, the former would be in breach.⁶² The Commission is careful to stipulate that its opinions are given without prejudice to the interpretation of the CJEU through the possibility or obligation of the court to have recourse to the preliminary reference procedure. However, in applying and enforcing the law the Commission may add its own – subjective – views on how a particular case law or Treaty or secondary law provision should be understood,⁶³ or extend its scope. In those circumstances, it would overstep the boundaries of its powers and circumvent the role of the CJEU. ⁶⁴

⁵⁹ F Snyder ‘The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques’ (1993) 56(1) *Modern Law Review* 19-54, 33

⁶⁰ ‘1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.’ (Although only ‘the Treaties’ are mentioned, it is assumed that all law should follow the Treaties.)

⁶¹ Broberg and Fenger also suggest that in policy areas where the Commission can issue binding decisions, such as in competition and State aid, the Commission “arguably both can and should assist the national court.” M Broberg & N Fenger *Preliminary References to the European Court of Justice* (OUP, 2010), 20

⁶² O Ştefan ‘European Competition Soft Law in European Courts: A Matter of Hard Principles?’ (2008) 14(3) *European Law Journal* 753-772, 764

⁶³ L Senden, ‘Soft Law and its Implications for Institutional Balance in the EC’ (2005) 1(2) *Utrecht Law Review* 79-99, 93

⁶⁴ Broberg and Fenger make a similar point: “...for the Commission to provide the national court with a form of assistance that the Treaty has placed in the hands of the Court of Justice could constitute a ‘*détournement de procédure*’.” M Broberg & N Fenger *Preliminary References to the European Court of Justice* (OUP, 2010), 21. Scott also points out several reasons to be concerned with this kind of interpretative or decisional guidance: “guidance may be treated as authoritative by the Member States. It may influence their attitude and behaviour, generating significant practical effects.” (p. 344) and it excludes courts “from being able to evaluate and shape the processes leading to the adoption of guidance of this kind.” (p. 346): J Scott ‘In Legal Limbo: Post-Legislative Guidance as a Challenge for European Administrative Law’ (2011) 48(2) *Common Market Law Review* 329-355

Another element in the sharing of functions between different institutions is the context of governance, particularly multilevel governance.⁶⁵ In this context, the traditional command and control role of courts is side-lined by cooperative processes in which a range of actors participate at multiple levels within the system.⁶⁶ This implies lesser importance of judicial adjudicative processes, and invites reconsideration of the judicial role and of courts as institutions. One feature of governance is the rise of regulatory agencies and networks between them. The rise of regulatory agencies and ‘jurisdictional power’ may have occurred at the expense of ‘jurisprudential power’.⁶⁷ At the EU level, this would suggest a tension between the Commission as an expert agency with a particular wide-ranging ‘jurisdiction’ in competition policy, and the Court of Justice losing ‘jurisprudential’ power. It would also link with the dominance of an integrated executive as discussed above.

5. Interpretative/institutional pluralism in a system of concurrent competences

“Institutional pluralism, *contrary to* the Montesquieian conception of separation of powers, whereby legislative, executive and judicial functions are separated, protects liberty through granting the same actors the same kind of legal authority to interpret the foundational framework – the Constitution.”⁶⁸ In general, interpretative pluralism has been defined as “simply the absence of a single binding or authoritative interpretation” or “openness to multiple interpretations”.⁶⁹ In the EU context interpretative pluralism is one aspect of constitutional pluralism.⁷⁰ As the name suggests, constitutional pluralism is founded on an interactive heterarchy rather than hierarchy.⁷¹ This is a shift from the

⁶⁵ R Rhodes ‘The New Governance: Governing without Government’ (1996) 44(3) *Political Studies* 652-67; M Egeberg *Multilevel Union Administration: The Transformation of Executive Politics in Europe* (PalgraveMacmillan, 2006); C Sabel & J Zeitlin ‘Learning from Difference: the New Architecture of Experimentalist Governance in the European Union’ (2008) 14(3) *European Law Journal* 271-327; D Coen & M Thatcher ‘Network Governance and Multi-level Delegation: European Networks of Regulatory Agencies’ (2008) 28(1) *Journal of Public Policy* 49-71; A Schout & A Jordan ‘Coordinated European Governance: Self-Organizing or Centrally Steered?’ (2005) 83 (1) *Public Administration* 201–220

⁶⁶ J Scott & S Sturm ‘Courts as Catalysts: Re-Thinking the Judicial Role in New Governance’ 13 *Columbia Journal of European Law* (2006-7) 565-594

⁶⁷ L Azoulai ‘The Judge and the Community’s Administrative Governance’ in C Joerges & R Dehousse (eds) *Good Governance in Europe’s Integrated Market* (OUP, 2002) 109-137, 111; L Azoulai ‘The Court of Justice and the Community’s Administrative Governance’ (2001) 7(4) *European Law Journal* 425-441, 428

⁶⁸ M Avbelj & J Komarek (eds) *Constitutional Pluralism in Europe and Beyond* (Hart 2011), 11-12

⁶⁹ R Stith ‘Securing the Rule of Law through Interpretive Pluralism: an argument from Comparative Law’ book, 420 (also Jean Monnet Center for International and Regional Economic Law and Justice working paper 01/07)

⁷⁰ M Poiaras Maduro, ‘Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism’, (2007) 1(2) *European Journal of Legal Studies* 1-21

⁷¹ For a full analysis see M Avbelj & J Komarek (eds) *Constitutional Pluralism in Europe and Beyond* (Hart 2011)

classical constitutional conception of European integration, in which diversity was seen as an obstacle to integration.⁷² Uniformity was to be achieved by the self-evidently hierarchical doctrine of supremacy, and the focus was on the Member State as a unit. The Court of Justice had the role of safeguarding the unity of EU law.

The concept of constitutional pluralism was first used to denote the relationship between the EU and national orders, in spite of the traditional doctrine of EU supremacy, following the Maastricht Treaty judgment in the German Constitutional Court.⁷³ Since then it has expanded to encompass relationships between other legal orders and actors at the “sub-state, trans-state, supra-state and on other non-state levels”:⁷⁴ for example, between European and international legal orders;⁷⁵ between the Court of Justice of the European Union and the European Court of Human Rights; and between regulatory, political and judicial spheres. Particularly this latter category emphasises the relevance of the concept for the multilevel governance⁷⁶ in EU competition law.

Komarek explains that “constitutional pluralism obtains when various constitutional authorities compete over the same territory and the same legal relationships.... these authorities have plausible claims to legitimacy and authority as perceived by those who are subject to them.”⁷⁷ This is relevant to competition enforcement given the cross-border nature of competition problems and the claims of competition authorities (and courts) in different Member States, as well as the European Commission, to take action, for example as mediated through the case allocation rules of the European Competition Network.

The European Commission’s Directorate General for Competition had a long-standing monopoly over competition enforcement, in addition to issuing rules through notices and guidelines. In recent decades NCAs have also built up considerable expertise.

Administrative authorities have therefore enjoyed primacy by virtue of their expertise in competition policy and enforcement. The burgeoning role of economic analysis and the

⁷² As shown in Case 166/73 *Rheinmühlen-Düsseldorf v Einfuhrund Vorratsstelle für Getreide und Futtermittel* [1974] ECR 33

⁷³ N Walker, ‘The Idea of Constitutional Pluralism’ (2001) 65 *Modern Law Review* 317

⁷⁴ See Introduction in M Avbelj & J Komarek (eds) *Constitutional Pluralism in Europe and Beyond* (Hart 2011), 3

⁷⁵ Cases C-402 & 415/05P *Kadi & Al Barakat International Foundation v Council & Commission* [2008] ECR I-6351

⁷⁶ See e.g. M Egeberg *Multilevel Union Administration. The Transformation of Executive Politics in Europe* (PalgraveMacmillan, 2006); F Scharpf ‘Notes Toward a Theory of Multilevel Governing in Europe’ (2001) 24(1) *Scandinavian Political Studies* 1-26; G Marks, L Hooghe & K Blank (1996) ‘European Integration Since the 1980s. State-Centric versus Multi-Level Governance’ (1996) 34(3) *Journal of Common Market Studies* 341-378; A Jordan (2001) ‘The European Union: an Evolving System of Multi-Level Governance ... or Government?’ (2001) 29(2) *Policy & Politics* 193-208

⁷⁷ J Komarek ‘Institutional Dimension of Constitutional Pluralism’, in M Avbelj & J Komarek (eds) *Constitutional Pluralism in Europe and Beyond* (Hart 2011), 231-247, 231

more economic approach following the 2004 reforms in competition enforcement⁷⁸ also demonstrates a shift from legal rules and the role of courts.

‘Those who are subject’ to those authorities would most obviously be firms as addressees of the substantive competition prohibitions in Articles 101 and 102 TFEU. But they could also be other institutions e.g. national competition authorities subject to jurisdictional rules such as parallel application of national and EU law when there is an effect on trade between Member States; a national court bound by the decisions of competition authorities in another Member State (as discussed in chapter 5).

These concurrent competences lend themselves to the idea of interpretative pluralism. From an institutional perspective, discussions of pluralism have primarily focused on relations between courts⁷⁹ and in different legal orders - that is, relations between national courts and the CJEU, or between international courts such as the CJEU and the ECtHR - rather than between courts and executive authorities, which is this thesis’s area of focus. On the interplay between courts and other actors, Maduro warns that “Courts must be aware that they do not have a monopoly over rules and that they often compete with other institutions in their interpretation.”⁸⁰

A focus on Maduro’s understanding of pluralism is appropriate, and in particular his category of interpretative pluralism, given its emphasis on institutions. Maduro identifies five expressions of pluralism: (1) different constitutional sources; (2) pluralism of different jurisdictions/constitutional sites (e.g. Kompetenz-Kompetenz – court deciding questions of its own competence); (3) interpretative pluralism/pluralism of institutions (most relevant here); (4) pluralism of powers; and (5) pluralism of polities/political communities.

The fourth category, pluralism of powers, is also relevant for the purposes of this thesis. Maduro recognises that “increasingly [there are] new forms of public and private power that challenge traditional legal dogmatic categories and raise constitutional questions because they affect the mechanisms of accountability linked to those legal categories.”

⁷⁸ A formal legal approach replaced by an effects-based approach to competition enforcement. See e.g. L-H Roeller & O Stehmann ‘The Year 2005 at DG Competition: The Trend Towards a More Effects-Based Approach’ (2006) 29 *Review of Industrial Organization* 281–304

⁷⁹ As observed by M Goldoni ‘Constitutional Pluralism and the Question of the European Common Good’ (2012) 18(3) *European Law Journal* 385–406

⁸⁰ Comments of M Poiares Maduro in ‘Four Visions of Constitutional Pluralism: symposium transcript’, (2008) 2(1) *European Journal of Legal Studies* 325–370, 331

Regulatory networks such as the European Competition Network would fall into this category.

The institutional pluralism in the third category refers to “a pluralism which is based not only on different sources but on competing interpretations of the *same source* by institutions that are *not organised in a hierarchical manner*.”⁸¹ [emphasis added] It is particularly apposite in the case of competition law because at the supranational level the European Commission has been central in developing the law, and between the national and supranational levels. Rules are organised in a hierarchical manner e.g. Art 3 Reg 1/2003. But there is no formal institutional hierarchy. The Commission is first among equals in the ECN. Regarding national courts, the rules are hierarchical due to the supremacy of EU law, apparently not according to the Commission’s status.⁸²

Tying to points made above about different claims to legitimacy, Komarek notes that “...the complex relationships between constitutional authorities also involve different institutions which make claims to legitimacy of a different kind... It is not just the Union on the one side, and its member states on the other.” He goes on to cite interactions between different institutions which may be in opposition with each other due to these different claims to legitimacy, alluding to some of the diagonal interactions which are the focus of this thesis: the Court of Justice (sometimes together with domestic courts) versus domestic legislators, *the Commission versus domestic courts*⁸³ or *courts versus the market*.⁸⁴ While on the latter point he makes reference to social regulation versus the economic fundamental freedoms, this could equally encompass courts’ understanding of competition law in relation to the dominant economic lens of consumer welfare.

⁸¹ Comments of M Poiars Maduro in M Avbelj & J Komarek (eds) ‘Four Visions of Constitutional Pluralism: symposium transcript’, (2008) 2(1) *European Journal of Legal Studies* 325-370, 331

⁸² Komninos argues “...primacy is not one of the Commission, as *competition authority*, over *civil courts*, but rather of the Commission, as *supranational Community organ*, over *national courts*.” (emphasis in original). Furthermore, ‘*Masterfoods* establishes no primacy of the Commission over national courts, but rather imposes duties on the latter to apply Community law in a consistent way under the final control of the Court of Justice...’: A Komninos, ‘Public and Private Antitrust Enforcement in Europe: Complement? Overlap?’ (2006) 3(1) *Competition Law Review* 5-26, 16

⁸³ J Komarek ‘Institutional Dimension of Constitutional Pluralism’, in M Avbelj & J Komarek (eds) *Constitutional Pluralism in Europe and Beyond* (Hart 2011), 231-247, 235. Here he refers to the *Masterfoods* duty of a court not to take a decision counter to one of the Commission, as discussed in later chapters of this thesis. Komarek argues that “Courts’ deference to administrative agencies’ interpretation of law is subject to a continuous debate in the U.S. (citing Vermeule, *Judging under Uncertainty. An Institutional Theory of Legal Interpretation* (Harvard University Press, Cambridge, Mass; London 2006) at 207-208), which seems to be entirely missing in the EU”.

⁸⁴ J Komarek ‘Institutional Dimension of Constitutional Pluralism’, in M Avbelj & J Komarek (eds) *Constitutional Pluralism in Europe and Beyond* (Hart 2011), 231-247, 235 fn 32. He supports this with reference to social regulation: AG Maduro’s opinion in C-438/05 *Viking Line* [2007] ECR I-10779 [41]-[42]

As with institutional balance, pluralism does not offer any way of resolving conflicts. Maduro suggests that institutions should use institutional comparison⁸⁵ to decide who is best placed to act. Kumm posits that legal actors – courts, administrative agencies, legislators – understand their actions as part of wider practice. As such there is a division of labour and powers. “What constitutionalism does suggest... is that the exact nature of each actor’s role and the exact limits of what a particular actor ought to be doing in a particular situation given decisions by other legal actors is very rarely determined exclusively by an authoritatively enacted rule regarding competencies.”⁸⁶ Constitutional pluralism therefore informs the debate on the current meaning of institutional balance and separation of powers. Komarek moves the focus from the institution which takes the decision to the *responses* of other institutions, and how they position themselves to make space for their own decisions.⁸⁷

Goldoni argues Maduro is still focused on a ‘single-institutionalist’ perspective of *courts* despite Maduro’s statement that courts need to be aware they do not have a monopoly over rules and their interpretation. This is because this perspective focuses on the need for courts to accommodate other institutions (including other courts), and to take responsibility for mediating the interactions between them, rather than incorporating the necessary cooperation or “institutional awareness”⁸⁸ of other institutions too. In this way institutional communication is designed to combine actors’ competence for a more legitimate decision. This idea of constitutional pluralism is also encapsulated in Hofmann & Türk’s concept of an integrated administration.⁸⁹ They also suggest that executive, parliamentary, judicial, and mutual control together should be applied to guarantee the legality and the legitimacy of inter-administrative cooperation and ‘shared sovereignty’. The problem is that there is no real specificity about how these interactions should be resolved in practice. The following chapters explore how these interactions play out.

One form of institutional communication is through the preliminary reference procedure. This is traditionally seen as a formalised dialogue between courts. The potential for the preliminary reference procedure to be used in the diagonal relationship between national

⁸⁵ M Poiars Maduro, ‘Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism’, (2007) 1(2) *European Journal of Legal Studies* 1-21, 18, with reference to N Komesar’s comparative institutional analysis.

⁸⁶ Comments of M Kumm ‘Four Visions of Constitutional Pluralism: symposium transcript’, (2008) 2(1) *European Journal of Legal Studies* 325-370, 359

⁸⁷ J Komarek ‘Institutional Dimension of Constitutional Pluralism’ in M Avbelj & J Komarek (eds) *Constitutional Pluralism in Europe and Beyond* (Hart 2011), 231-247, 232

⁸⁸ M Goldoni ‘Constitutional Pluralism and the Question of the European Common Good’ (2012) 18(3) *European Law Journal* 385-406, 395 et seq; the role of non-judicial institutions at 400.

⁸⁹ H Hofmann & A Türk ‘The Development of Integrated Administration in the EU and its Consequences’ (2007) 13 (2) *European Law Journal* 253-271

administrative authorities, specifically competition authorities, and the Court of Justice is explored in chapter 3 below. In this respect Komarek draws attention to the *Costanzo*⁹⁰ obligation, according to which an administrative authority is to disapply domestic legislative rules if that authority believes they conflict with Union law. Following *Costanzo*, administrative authorities have no opportunity to ask for advice before doing so. Komarek proposes that the Court of Justice should accept such references if there is no appeal to a court and further “if [the referring authority] carries out judicial duties in accordance with a rule which, by virtue of form or content, is constitutional.”⁹¹ It is arguable that the competition rules are central to the Union’s constitution.

Beyond how the principle can be realised in practice, the principal controversy with constitutional pluralism is whether it is even possible to have unity and coherence without one ultimate authority having the last word.⁹² Given that a constitution is the highest source of law, some scholars are understandably sceptical about the concept of constitutional pluralism.⁹³ Davies argues that it is an empty idea on the basis that “Where there are multiple sources of apparently constitutional law one always takes precedence and the other is then no longer constitutional.”⁹⁴ Conversely, Maduro believes that it is possible to have unity and coherence without an authoritative decision.⁹⁵ This raises questions about the ultimate role of the CJEU, particularly in competition law in which the Commission has been so central. One way to understand this would be that interpretative pluralism suggests a looser interpretation of unity or coherence itself.

In its current state, it is not clear whether pluralism relates to different systems of law, or the interpretations of different institutions within that system.⁹⁶ In the case of Member State authorities and courts, it can be argued that they are applying two constitutional

⁹⁰ C-103/88 *Fratelli Costanzo v Milano* [1989] ECR 1839. See also C-198/01 *Conorzio Industrie Fiammiferi v Autorita Garante della Concorrenza e del Mercato* [2003] ECR I-8055

⁹¹ J Komarek ‘Institutional Dimension of Constitutional Pluralism’, in M Avbelj & J Komarek (eds) *Constitutional Pluralism in Europe and Beyond* (Hart 2011), 231-247, 239 citing the AG’s opinion in C-205/08 *Alpe Adria Energia* [2009] ECR I-11525 [48]: AG Colomer showing his concern for the judicial role, as in *De Coster*, discussed in further detail in the following chapter.

⁹² Comments of J Baquero Cruz in M Avbelj & J Komarek (eds) of Constitutional Pluralism: symposium transcript’ (2008) 2(1) *European Journal of Legal Studies* 325-370, 340

⁹³ E.g. J Weiler ‘Prologue: Global and Pluralist Constitutionalism: some doubts’ in G de Burca & J Weiler (eds) *The Worlds of European Constitutionalism* (CUP, 2011) “reacts against the ubiquity and vacuity of the term constitutional pluralism”, preferring ‘constitutional tolerance’.

⁹⁴ G Davies ‘Constitutional Disagreement in Europe and the Search for Pluralism’ in J Komarek & M Avbelj (eds) *Constitutional Pluralism in Europe and Beyond* (Hart Oxford 2012), 281. See also Baquero Cruz; Avbelj in the same volume.

⁹⁵ Comments of M Maduro in response to J Baquero Cruz in M Avbelj & J Komarek (eds) of Constitutional Pluralism: symposium transcript’ (2008) 2(1) *European Journal of Legal Studies* 325-370, 340

⁹⁶ Baquero Cruz draws a distinction between pluralism *within* a legal order and pluralism *between* legal orders in M Avbelj & J Komarek (eds) of Constitutional Pluralism: symposium transcript’ (2008) 2(1) *European Journal of Legal Studies* 325-370, 333

systems of law – national law and EU law, albeit that national law is embedded within EU law due to the latter’s supremacy. In competition law, the convergence rule in Art 3 Reg 1/2003 requires parallel application of EU and national law. However, at the supranational level, the Commission and the Court are interpreting the same *system* of – EU - law. In that sense, where is the pluralism? One answer is that these institutions may still have different interpretations. Halberstam distinguishes between two kinds of constitutional pluralism: interpretive pluralism (pluralism of interpreters) and normative pluralism (pluralism of sources).⁹⁷ This goes some way to responding to Davies’ argument that constitutional pluralism is an empty idea on the basis that “Where there are multiple *sources* of apparently constitutional law one always takes precedence and the other is then no longer constitutional.”⁹⁸ [emphasis added]. In this thesis the emphasis is on pluralism of interpreters – the European Commission, the Court of Justice, national competition authorities and national courts - as they are often drawing on the same source, such as the judgment in a previous case, a Regulation, or a notice.

The Commission often rehearses that its opinion is without prejudice to the interpretation of the Court of Justice. However, others have found that the Commission uses both judicial and legislative channels of influence, and that the Commission puts pressure on the Council of Ministers in legislative mode through its intervention in the judicial mode.⁹⁹ It does this through intervening in proceedings in the Court of Justice.¹⁰⁰ The emphasis here is on the judicial law-making of the Court, and the influence of the Court’s judgment on the Member States.

However, it does not acknowledge the influence of the legal opinion of the Commission itself in the Court proceedings. Harlow notes that the Commission habit of appearing regularly as *amicus curiae* or *intervener* in preliminary references is a strategy designed to enhance its position next to the Court.¹⁰¹ Others have found that the Court of Justice aligns its judgment with the Commission's observations in the vast majority (around 90%)

⁹⁷ D Halberstam ‘Constitutional Hierarchy: The Centrality of Conflict in the European Union and the United States’ in J Dunoff and J Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Government* (CUP, 2009) 326-355

⁹⁸ G Davies ‘Constitutional Disagreement in Europe and the Search for Pluralism’ in J Komarek & M Avbelj (eds) *Constitutional Pluralism in Europe and Beyond* (Hart Oxford 2012), 281

⁹⁹ A Hofmann ‘Litigation Strategy and Litigation Dynamics – The European Commission Before the Court of Justice’ paper delivered at European Consortium on Political Research (ECPR) Standing Group on EU Politics conference, Sept 2008, Riga

¹⁰⁰ This aligns with Scharpf’s supranational-hierarchical mode of policy-making: “Given the Court’s power of judicial legislation and its own enforcement powers, the Commission is then able to avail itself of [these] distinct legislative options”. F Scharpf ‘The Joint-Decision Trap Revisited’ (2006) 44(4) *Journal of Common Market Studies* 845-864, 852

¹⁰¹ C Harlow ‘Three Phases in the Evolution of EU Administrative Law’ in P Craig & G de Burca (eds) *The Evolution of EU law*, (OUP, 2nd edn, 2011) 439-464, 449

of cases. In a review of various empirical studies, Conant reports that the Court of Justice is “most likely to agree with the *legal analysis* of the Commission”.¹⁰² (emphasis added). This reference to legal analysis is interesting as it emphasises that the Commission also has a ‘judicial’ view alongside the Court. The impact of the Commission’s intervention gives an indication of what will happen at the national level where the Commission intervenes in national judicial proceedings (explored more fully in chapter 4). It also highlights the gap between vertical and horizontal accountability mechanisms when a supranational executive actor intervenes in a national court.

6. Conclusions

Interpretative pluralism suggests that there is a heterarchy, rather than a hierarchy, of valid interpretations of law in the EU system. This is relevant in a system of concurrent competences such as in the post-2004 competition enforcement regime. The principle of institutional balance is the EU’s version of the separation of powers at the supranational level. However, the functions of legislative, executive and judiciary are not vested in respective single institutions. Alongside the CJEU, the European Commission has judicial functions, evident in competition law – in individual cases it can declare infringements and impose fines; and at the system level it gives its interpretation of the law through notices and guidelines. Despite their soft law status, these interpretations have weight given the Commission’s historical centrality in the competition system. The Commission’s authorship of soft law instruments at the legislative level suggests its primacy in the interpretation of those instruments at the enforcement level. The concurrent powers of the CJEU and Commission suggest that where the Commission authors soft law instruments at the legislative level, or makes a quasi-judicial decision (such as imposing a fine) regarding specific parties, it has primacy over interpretation at the enforcement level. In addition, the Commission now has the ability to intervene in individual cases before courts with legal opinions. It is questionable whether there can be a ‘diagonal’ institutional balance between the supranational and the national levels, which activates the judicial autonomy of Member State courts. However, there is a duty of loyal cooperation between the EU institutions and authorities and courts at the sub-state level. A plurality of interpretations – and interpreters – of the law suggests a looser concept of unity or coherence. The following chapters consider the impact of mechanisms for coherence and show how these institutional interactions play out in practice: NCAs and

¹⁰² L Conant ‘Review Article: The Politics of Legal Integration’ (2007) 45 issue supplement s1 *Journal of Common Market Studies* 45-66. She cites various studies (e.g. Stone Sweet, Cichowski) covering preliminary references as well as direct actions.

the Court of Justice; the European Commission and national courts; and national competition authorities and national courts where NCAs decisions are binding.

CHAPTER 3: NATIONAL COMPETITION AUTHORITIES' (LACK OF) ACCESS TO THE COURT OF JUSTICE

1. Introduction

This chapter explores the diagonal relationship between the Court of Justice of the European Union (CJEU) and national competition authorities (NCAs). Given the relationship of NCAs with the European Commission through the European Competition Network (ECN), taken together with the following chapter it contributes to the question of how the Commission challenges, or complements, the role of the CJEU. The chapter investigates the CJEU's concept of a 'court or tribunal', through the admissibility requirements of the preliminary reference procedure under Article 267 TFEU.¹ This is significant because only a 'court or tribunal' has jurisdiction to address a question to the Court of Justice. The preliminary reference procedure is important as the primary means for encouraging coherence of EU law through the CJEU's interpretation.

This chapter considers how a national competition authority as a quasi-judicial agency has attempted, unsuccessfully, to use the judicial tool of the preliminary reference procedure. As such it demonstrates practical effects of judicial and administrative institutional definitions.

In 2003 the Hellenic Competition Commission requested a preliminary ruling from the CJEU in the *Syfait* case² on the substantive question of parallel imports and the potential abuse of a dominant position under Article 102 TFEU. In ruling its request inadmissible, the Court has in effect blocked NCAs with a particular structure from engaging with it. In terms of the diagonal relationships in Figure 1's institutional diagram in the introduction: it is argued that while the European Commission, as a supranational administrative authority, has strengthened its links with national courts through *amicus curiae*

¹ The text of Article 267 TFEU reads:

“The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the *interpretation of the Treaties*; [clearly this includes Articles 101 and 102]

(b) the *validity and interpretation* of acts of the institutions, bodies, offices or agencies of the Union; [this includes Council Regulations and Commission Decisions]

...

Where such a question is raised before any *court or tribunal* of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a *court or tribunal* of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.” [emphasis added]

² C-53/03 *Synetairismos Farmakopion Aitolias & Akamanias v GlaxoSmithkline Plc* [2005] ECR I-4609

mechanisms, as demonstrated in the following chapter, the Court of Justice seems motivated to preserve its dialogue between courts only and to exclude quasi-judicial national authorities. However, if the CJEU adopts a narrow definition of a court or tribunal, it constrains its own jurisdiction.

National courts have parallel avenues of communication with, or intervention from, EU supranational bodies in competition law – one through Commission opinions, and one from the preliminary reference procedure. For example, the following chapter uncovers a number of cases particularly in the Spanish courts under Article 101 TFEU concerning treatment of agency agreements in the service station sector, in which the courts asked both for advice of Commission and Court of Justice. However, NCAs with integrated functions are effectively barred from seeking a preliminary ruling from the Court of Justice as they do not meet the definition of a court or tribunal following the CJEU's judgment in *Syfait*. The most common, although not universal, institutional model of competition enforcement among the Member States is the integrated administrative authority. As such, NCAs' assistance with interpreting the law is with the European Commission through the European Competition Network (ECN).

This has implications for the consistent application of EU competition law first as between types of authorities, since some may find preliminary ruling requests denied while others are admitted, depending on the Member State's institutional design of its competition enforcement regime. Secondly, NCAs involved in public enforcement and national courts in private enforcement are subject to different mechanisms.

1.1 Outline of the chapter

The chapter is structured as follows. It first sets the context by surveying the post-2004 landscape, in particular multiple enforcers and the challenge of consistent application of antitrust rules in decentralised enforcement; and the quasi-judicial nature of competition enforcement undertaken by these multiple enforcers. It goes on to consider the implications of Article 35 Regulation 1/2003³, according to which Member States can decide the appropriate institutional structures for public enforcement of competition law. In the second part the discussion turns from the designation of courts or administrative

³ 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, OJ L 1, 4.1.2003, 1-25, in force 1.5.2004. In particular, the Regulation grants national competition authorities and national courts the power to grant exemptions under Article 101(3) TFEU, previously the exclusive domain of the European Commission.

agencies as competition authorities at the national level, to the criteria in the EU definition of a 'court or tribunal' for the purposes of the preliminary reference procedure. It considers how the CJEU including its Advocates General have defined and developed the concept through specific, albeit occasionally flexible, criteria. The third part focuses on the *Syfait* case. Whereas the Advocate General would allow the reference, the Court declared it inadmissible in a relatively brief judgment. The analysis focuses on the CJEU's interpretation of the independence criterion, and the possibility for the Commission to deprive the Hellenic Competition Commission of its jurisdiction under Article 11(6) Regulation 1/2003. The remainder of the chapter analyses whether the judgment does bar all NCAs from access to the CJEU; the interests of NCAs and the Court; and wider considerations of judicial economy, the floodgates argument, expertise, and consistent application and interpretation of the law. The chapter concludes with an assessment of the asymmetric avenues to the supranational level for national courts and competition authorities.

2. The post-2004 landscape

2.1 Multiple enforcers and the challenge of consistent application

In post-2004 EU competition enforcement, multiple enforcers with parallel powers operate. Decentralisation of enforcement of Articles 101 and 102 TFEU under Regulation 1/2003 has led to an increase in the powers and jurisdiction of national competition authorities (NCAs) and national courts.⁴ National courts may be involved in competition law enforcement by adjudicating in disputes between private parties; as a competition authority; or in a judicial review function. Given the greater number of competition enforcers and the possibility for burden sharing, the decentralised regime should give rise to more effective enforcement and more efficient allocation of resources. However, decentralisation also increases the risk of divergent application of the rules.

⁴ For an account of the reforms, see for example C-D Ehlermann 'The Modernization of EC Antitrust Policy: A Legal and Cultural Revolution' (2000) 37 *Common Market Law Review* 537-574; D Gerber 'Modernising European Competition Law: A Developmental Perspective' (2001) 22(4) *European Competition Law Review* 122-130; J Venit 'Brave New World: The Modernization and Decentralization of Enforcement under Articles 81 and 82 of the EC Treaty' (2003) 40 *Common Market Law Review* 545-580; H Kassim & K Wright (2007) 'Revisiting Modernisation: the European Commission, Policy Change and the Reform of EC Competition Policy', ESRC Centre for Competition Policy working paper 07-19; H Kassim & K Wright 'Bringing Regulatory Processes Back In: Revisiting the Reform of EU Antitrust and Merger Control' (2009) 32(4) *West European Politics* 738-755

Such divergent application could manifest itself in various ways.⁵ First, there could be differential application of EU law between jurisdictions. Secondly, there could be inconsistency between EU and national competition law. The third category is diagonal divergence, in which there may be a substantive clash between EU competition law and national laws in other policy areas.⁶ The final category of potential divergence, most relevant to this chapter's discussion, can be characterised as institutional divergence. This relates to different categories of enforcers – national competition authorities as public enforcers, and national courts in private enforcement between individual parties. NCAs select their cases, whereas courts are reactive. NCAs⁷ are linked to the administration and operate according to overarching policy and resource priorities, whereas judges autonomously decide individual cases on the basis of the issues brought before them by the parties. National competition authorities, by definition specialising in competition law on a daily basis, should have more expertise than generalist national judges delivering judgments alone. A related issue is the different interpretations of economic analysis in competition cases.⁸

More crucially, national competition authorities in a public enforcement function are closely linked horizontally with their counterparts and vertically with the European Commission, specifically DG COMP, through the cooperation mechanisms of the European Competition Network (ECN), with its rules for case allocation and consistent application of Community competition law.⁹ However, there is no such mechanism involving national courts, respecting the principles of judicial independence and procedural autonomy of the Member States.

⁵ These categories relate to single case consistency – see e.g. D Gerber & P Cassinis 'The "Modernisation" of European Community Competition Law: Achieving Consistency in Enforcement – Part II' (2006) 27(2) *European Competition Law Review* 51-57, and on some types of divergence D Gerber & P Cassinis 'The "Modernisation" of European Community Competition Law: Achieving Consistency in Enforcement – Part I' (2006) 27(1) *European Competition Law Review* 10-18, 11; K Lenaerts and D Gerard 'Decentralisation of EC Competition Law: Judges in the Frontline', (2004) 27(3) *World Competition* 313-349, 316

⁶ M C Lucey 'Unforeseen Consequences of Article 3 of EU Regulation 1/2003' (2006) 27 *European Competition Law Review* 558-563, 561

⁷ Taken as a whole without disaggregating their investigatory and adjudicatory functions

⁸ E.g. I Lianos "'Judging Economists": Economic Expertise in Competition Litigation: a European View' in I Lianos & I Kokkoris (eds) *Towards an Optimal Competition Law System* (Kluwer International, 2009) 185-320; E Barbier de la Serre & A-L Sibony 'Expert Evidence Before the EC Courts' (2008) *Common Market Law Review* 941-985

⁹ Commission Notice of 27 April 2004 on cooperation within the Network of Competition Authorities, OJ C 101, 27.4.2004, 43-53 (the Network Notice)

2.2 Multiple enforcers in a quasi-judicial environment

In addition, these multiple enforcers operate in a quasi-judicial system of competition regulation and enforcement: 'quasi-judicial' in terms of both institutional structure and function. This quasi-judicial nature encompasses several elements. Investigative, decision-making and enforcement functions may be carried out by a single agency. Competition authorities have the competence to make binding legal determinations, but they are integrated into the public administration. There are different configurations of administrative and judicial bodies making and enforcing the law and there are different degrees of persuasive or binding force attached to the rules they apply and make. At the systemic level rules are elucidated through soft law instruments as well as hard rules. Finally, administrative authorities have become more juridified in terms of formality, approach to evidence, procedural rights and reporting of decisions.¹⁰

The European Commission itself has been characterised as investigator, prosecutor and judge¹¹ in its enforcement of competition policy, and at the national level there are different models for public enforcement. In some Member States, courts are involved in public as well as private enforcement of competition law. We therefore see cross-over of the judicial and administrative spheres. This becomes relevant for the definition of a 'court or tribunal' in the preliminary reference procedure. As Advocate General Ruiz-Jarabo Colomer stated in *De Coster* "exercise of 'judicial functions' and 'judicial body' are not synonymous terms."¹²

2.3 Article 35 Regulation 1/2003 and choice of institutional structure

Article 35 of Regulation 1/2003¹³ allows Member States to decide the appropriate institutional structures for public enforcement of competition law, subject to the

¹⁰ See generally, L C Blichner and A Molander 'Mapping Juridification' (2008) 14(1) *European Law Journal* 36. In the context of competition law, I Maher 'Juridification, Codification and Sanction in UK Competition Law' (2000) 63(4) *Modern Law Review* 544-569

¹¹ See, for example, W Wils, 'The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis' (2004) 27(2) *World Competition* 201-224

¹² Case C-17/00 *De Coster v Collège des Bourgmestres et Échevins de Watermael-Boitsfort* [2001] ECR I-9445 [117]

¹³ "Article 35: Designation of competition authorities of Member States

1. The Member States shall designate the competition authority or authorities responsible for the application of Articles [101] and [102] of the Treaty in such a way that the provisions of this regulation are effectively complied with. The measures necessary to empower those authorities to apply those Articles shall be taken before 1 May 2004. The authorities designated may include courts.

principles of effectiveness and equivalence; that is, that the effectiveness of Community law is not impeded and that equal treatment is ensured throughout the Community with equivalent proceedings implementing national and EU law.¹⁴ According to *Commission v Greece*, Member States must establish a system of sanctions which are effective, proportionate and which dissuade infringements of EU law.¹⁵ Member States must also mutually recognise the standards of each other's competition enforcement structures, regardless of the differences across the EU.¹⁶

The lack of prescription about specific institutional structure is a manifestation of the Member States' procedural autonomy. Article 35(2) was drafted to reflect the reality of the status quo in the Member States rather than establishing a common institutional model.¹⁷ But subsequently, membership of the ECN has had an impact on national enforcement structures, with most opting for an integrated administrative agency.

Three models are identified: an integrated monist structure carrying out investigative and adjudicative functions, and two breeds of dualist structure - or monist, dualist, and appeal

2. When enforcement of Community competition law is entrusted to national administrative and judicial authorities, the Member States may allocate different powers and functions to those different national authorities, whether administrative or judicial.

3. The effects of Article 11(6) apply to the authorities designated by the Member States including courts that exercise functions regarding the preparation and the adoption of the types of decisions foreseen in Article 5 [require that infringement be brought to an end; order interim measures; accept commitments or impose fines, periodic penalty payments or any other penalty provided for in their *national* law]. The effects of Article 11(6) do not extend to courts insofar as they act as review courts in respect of the types of decisions foreseen in Article 5.

4. Notwithstanding paragraph 3, in the Member States where, for the adoption of certain types of decisions foreseen in Article 5, an authority brings an action before a judicial authority that is separate and different from the prosecuting authority and provided that the terms of this paragraph are complied with, the effects of Article 11(6) shall be limited to the authority prosecuting the case which shall withdraw its claim before the judicial authority when the Commission opens proceedings and this withdrawal shall bring the national proceedings effectively to an end.”

Recital 35 Reg 1/3002: “In order to attain a proper enforcement of Community competition law, Member States should designate and empower authorities to apply Articles [101] and [102] of the Treaty as public enforcers. They should be able to designate administrative as well as judicial authorities to carry out the various functions conferred upon competition authorities in this Regulation. This Regulation recognises the wide variation which exists in the public enforcement systems of Member States. The effects of Article 11(6) of this Regulation should apply to all competition authorities. As an exception to this general rule, where a prosecuting authority brings a case before a separate judicial authority, Article 11(6) should apply to the prosecuting authority subject to the conditions in Article 35(4) of this Regulation, where these conditions are not fulfilled, the general rule should apply. In any case, Article 11(6) should not apply to courts insofar as they are acting as review courts.”

¹⁴ Case 33/76 *Rewe-Zentralfinanz v Landwirtschaftskammer für das Saarland* [1976] ECR 1989 [5]; Commission Staff Working Paper, Commission Proposal for a Council Regulation Implementing Articles 81 and 82 EC, National Courts in public enforcement (Article 36) [now Art 35], SEC (2002) 408, Brussels 11.4.2002, 3

¹⁵ Case 68/99 *Commission v Greece* [1989] ECR 2965 [23]-[25] cited in the Network Notice, n.9 [2]

¹⁶ Joint Statement of Council and Commission on the functioning of the network, Council document no. 15435/02 ADD 1, [8]

¹⁷ Commission Staff Working Paper, Commission Proposal for a Council Regulation Implementing Articles 81 and 82 EC, National Courts in public enforcement (Article 36) [now Art 35], SEC (2002) 408, Brussels 11.4.2002, p. 3 (SWP on national courts in public enforcement)

structure as they are named in the Commission's staff working paper on public enforcement.¹⁸

(A) an integrated agency, competent to investigate and to take decisions, with potential for judicial review or appeal of the final agency decision before a court;

(B) split functions, with the investigation carried out by an administrative agency, and the final decision on whether there is an infringement taken by a court or specified tribunal, again with the possibility of judicial review of the final decision; and

(C) an administrative agency investigates and may decide that there is *no* infringement, but if it determines that there is an infringement, a court must pronounce a prohibition or impose sanctions, with the possibility of that decision being appealed to a higher court.

These models are best seen on a continuum rather than in strictly separated categories, as there are nuances within each category. Examples of integrated NCAs (type A) include the German Bundeskartellamt, the Italian Autorità garante della concorrenza, Dutch Nederlandse Mededingingsautoriteit, Portuguese autoridade da concorrência, Hungarian Competition Authority, the Slovak Monopoly Office, Czech Office for the Protection of Competition and the United Kingdom Office of Fair Trading (OFT). The UK is to adopt an 'enhanced administrative model' in the planned Competition and Markets Authority,¹⁹ merging together the competition functions of the OFT and the UK Competition Commission, which is not currently a member of the European Competition Network. Within type A, some authorities have an investigatory arm which makes recommendations to a decision-making board or council, for example the Danish Competition Council, the Latvian Competition Council and the Hellenic Competition Commission.

Examples of a type B dualist structure, where there is a court making the final determination as to anti-competitive conduct, include Belgium, whose Competition Council is an administrative court in national constitutional terms. Until recently, France and Spain fell into this category, but have now opted for an integrated structure along the lines of DG COMP. Estonia is a special case, where civil penalties can be imposed by the authority but a court must deal with misdemeanour or criminal matters.

According to dualist structure (C), the investigating agency must go to a court to request imposition of penalties. Again, there are differences within this category. In Ireland only

¹⁸ SWP on national courts in public enforcement, 4. See also Network Notice recital 2.

¹⁹ Department for Business, Innovation and Skills (BIS), 'Growth, Competition and the Competition Regime: Government Response to Consultation', March 2012, available at <http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/g/12-512-growth-and-competition-regime-government-response.pdf> (accessed 16.4.2012)

the court can formally find an infringement, as well as impose fines. In Finland the competition authority may make the declaration of infringement but must go to court to impose the fine. In Sweden, any court may impose penalties but the Market Court (Marknadsdomstolen) is the final appeal court in competition cases.²⁰

In some Member States, the declaration of an infringement itself is viewed as a penalty. For example, in the Czech Republic *Tupperware* case²¹ Brno Regional Court ruled that the Czech competition authority's declaration of a concurrent breach of Czech and Community competition laws violated the principle of *ne bis in idem* despite one joint penalty being imposed. This was subsequently overturned by the Czech Supreme Administrative Court.²²

In deciding on the institutional design of their competition regimes, and in particular the role of courts, tribunals or administrative agencies, Member States must, implicitly at least, consider the trade-offs identified by Trebilcock and Iacobucci²³: independence/accountability; expertise/detachment; transparency/confidentiality; administrative efficiency/due process; predictability/flexibility. A Member State may need to designate a court as a competition authority for constitutional reasons, for example certain penalties can only be imposed by a court.

In the configurations outlined above, courts are involved in a public, as opposed to private, enforcement role, and are viewed as competition authorities for the purposes of Regulation 1/2003 and the Network Notice. In their private enforcement capacity, relations between the national courts and the Commission are covered by certain provisions of Regulation 1/2003 elaborated by the Courts Notice.²⁴

²⁰ For more discussion of Member States' structure see S Brammer 'Co-operation Between National Competition Agencies in the Enforcement of EC Competition Law' (Hart, 2009) at 113-122; 'Current Developments in Member States' (2010) 6(3) *European Competition Journal* 709-785; L Idot 'A Necessary Step to Common Procedural Standards of Implementation of Articles 81 and 82 EC without the Network' in C-D Ehlermann and I Atanasiu (eds) *European Competition Law Annual 2002: constructing the EU Network of competition authorities* (Hart, 2004) 211-221 and C Gauer 'Does the Effectiveness of the EU Network of Competition Authorities Require a Certain Degree of Harmonisation of National Procedures and Sanctions?' in the same volume, 187-201. Aspects of Idot's analysis are now out of date. She was writing at a time when "the main choice for Member States [wa]s not between an ordinary court and an administrative body, but between a government department and an independent administrative authority." Idot also asserts that all such authorities are courts and tribunals for purposes of Art 267 TFEU, while acknowledging that the definition is stricter for the purposes of Art 6 ECHR and Art 47 EU Charter of Fundamental Rights.

²¹ Case No. 62 Ca 4/2007-115, *Tupperware*, Brno Regional Court, 1.11.2007

²² For a fuller discussion see M Petr 'The Ne Bis in Idem Principle in Competition Law' (2008) 29(7) *European Competition Law Review* 392-400

²³ M Trebilcock and E Iacobucci 'Designing Competition Institutions: Values, Structure and Mandate' (2002) 25 *World Competition* 372-80, 361

²⁴ Commission Notice of 27 April 2004 on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, OJ C 101, 27.04.2004, 54-64

2.4 Duality and the significance of being 'judicial' and/or 'administrative': double obligations on NCAs?

The Courts Notice accompanying Regulation 1/2003 defines its scope as the relationship between the European Commission and “those courts and tribunals within an EU Member State that can apply Articles [101] and [102] and that are authorised to ask a preliminary question to the Court of Justice of the European [Union] pursuant to Article [267 TFEU] ...” (recital 1). Therefore if the CJEU did consider a reference from an NCA to be admissible, it would fall within the scope of both the Court Notice and the Network Notice. Recital 2 of the same Notice explicitly states that where a national court is *also* designated as a competition authority pursuant to Article 35(1) of the Regulation, cooperation with the Commission is covered *both* by the Courts notice and the Network Notice – does this imply dual powers and obligations?

The relevant obligations are those to inform the Commission without delay after the first formal investigative measure (Art 11(3) and informing the Commission at least 30 days before a decision is taken on the existence of an infringement, or a decision to accept commitments or to withdraw the benefit of a block exemption under Art 29 (art 11 (4)), and the competence of the Commission to remove a case from the national body's jurisdiction (article 11(6) Regulation 1/2003).

This means that, depending on the national designation, some national competition authorities engaged in public enforcement will be subject to only the Network Notice, whereas others will be subject to both the Network Notice and the Courts Notice. A court cannot only be covered by the Courts Notice when it is involved in public enforcement.

Article 5 lays down the powers of decision of competition authorities: they may require that an infringement be brought to an end; order interim measures; accept commitments; impose fines, periodic penalty payments or any other penalty provided for in their national law; or decide that there are no grounds for action. This negative clearance does not affect other NCAs, or the Commission's, competence to take action in their own jurisdictions.

The Regulation is not similarly prescriptive for the powers of the national courts. Article 6 merely states that they shall have the power to apply Articles 101 and 102 of the Treaty. An examination of the pre-legislative Council of Ministers documents reveals that the

emphasis was in recognising courts' power to apply those articles in their entirety.²⁵ The explicit distinction also originates from the Council negotiations, in which some Member States wished to clearly differentiate between courts as competition authorities and courts deciding disputes between private parties.²⁶

Article 11(6) of Regulation 1/2003 provides for the possibility of the Commission opening its own investigation and taking over a case where an NCA is already dealing with the matter, in certain limited circumstances.²⁷ However, the Commission may not take over while an appeal or review is ongoing in a court – “The effects of Article 11(6) do not extend to courts insofar as they are acting as review courts...” (Article 35(3) and Recital 35 of the Regulation). Recital 35 of the Regulation states that where the public enforcement function is separated, as in configurations B and C described above, and a prosecuting administrative authority brings a case before a separate judicial authority for an infringement decision, prohibition pronouncement or to impose a fine, the effects of Article 11(6) only apply to the prosecuting authority. The prosecuting authority should withdraw its case before the judicial authority when the Commission opens proceedings, bringing the national proceedings to an end.

NCA's must notify the Commission when an investigative procedure is opened (Art 11(3)). NCA's must also inform²⁸ the Commission of an intended decision 30 days before it is

²⁵ The original wording in the proposal was “National courts before which the prohibition in Article 81(1) [now 101(1)] of the Treaty is invoked shall also have jurisdiction to apply Article 81(3) [now 101(3)].” Germany requested that national courts also be given full competence to apply Article 82 [102]. In addition, according to Council Document 5158/01 Secretariat to delegations, 11.1.2001, Spain had a reservation on greater involvement of national courts in the application of Community competition law; and France, Ireland and Finland requested a clear definition of the term ‘national courts’. The ultimately-adopted wording was a Swedish Presidency proposal (Council Document 9999/01 Secretariat to delegations, 27.6.2001)

²⁶ During the negotiations in the Council of Ministers, Ireland and Finland noted the problematic division between competition authorities and courts for their respective national systems. Ireland’s competition authority is not empowered to take the decisions envisaged under Article 5. Regarding co-operation between the Commission and NCA's (Art 11), Belgium, Greece, Spain, Ireland, Portugal and Finland all requested clarification on the role of courts and other separate bodies which constitute NCA's - Council Document 5158/01 Secretariat to delegations, 11. 1.2001. Under Article 35 [36 in the original proposal], Ireland and the Netherlands requested a clear statement of the powers exercisable by an NCA - Council Document 9999/01 Secretariat to delegations, 27. 6. 2001

²⁷ Circumstances in which Art 11(6) may be activated are listed in Network Notice at [54]: if network members envisage conflicting decisions in the same case; network members envisage a decision which is obviously in conflict with existing case law; a network member is unduly drawing out proceedings in the case; or there is a need to adopt a commission decision to develop Community competition policy to ensure effective enforcement.

²⁸ In the original Regulation proposal, the Commission drafted that NCA's were obligation to ‘consult’ the Commission before adopting a position. Most Member States objected to this, and through Council negotiations, this was softened to “inform”. Record of the reform negotiations in Council of Ministers – Council document 5158/01 Secretariat to delegations , 11.9.2001

formally adopted (Art 11(4)) with a view to the Commission making observations if consistent application of the rules is threatened.²⁹

If the functions are split between agencies, the body which starts an investigation has the obligation to inform the Commission under Art 11(3), but the decision-making authority has the obligation, under Art 11(4), to notify its decision before it is adopted. In Member States where the finding of infringement, or imposition of a penalty, is performed by a court following an investigation by an authority, the authority will be responsible for fulfilling the obligation under Art 11(3) (notifying the Commission of initiation of formal investigative measures) whereas the court will be responsible under Art 11(4) (informing the Commission 30 days before adopting a decision).

One practical illustration of the importance of distinguishing between the two functions once the court has been designated a competition authority is that where a court grants an injunction it may be regarded as an Article 5 decision requiring that an infringement be brought to an end. This would trigger the Art 11(4) duty to inform the Commission 30 days before such a decision is adopted, resulting in the court having to postpone (“reserve”) judgment when the decision is clearly well founded. Worse, it would allow the competition infringement to continue until the 30 days were up. Following the letter of the Regulation, the resulting judgment would also need to be forwarded to the Commission once delivered, under Article 15(2), which would be an unnecessary duplication, since both articles serve the same function of keeping the Commission apprised of decisions in the Member States.³⁰

There is some confusion around this obligation. Rapporteurs to the FIDE Congress reported that courts have been notifying envisaged decisions when supposedly they do not have to do so.³¹ But this is a misunderstanding of the obligation in Article 11(4). Art 35 Regulation 1/2003 does not say that courts (as public competition authorities) are not bound by 11(4), only that they are not affected by 11(6) i.e. the Commission cannot take over the cases at that stage.

²⁹ Incidentally, interview evidence suggests that once notified, unless an immediate problem is identified the decision tends to “sit in a drawer” for the 30 days, and the Commission officials are not overzealous about making suggestions if they agree with the substantive result, even if they disagree with the drafting (interview with DG COMP official, Brussels, 13.7.2006)

³⁰ See in respect of Ireland, N Mackey ‘Which Hat Should I Wear Today? Reflections on the Courts as Competition Authorities: Ireland’s Implementation of Regulation 1/2003’ Paper delivered at the Irish Centre for European Law, 8.5.2004. Available at <http://www.tca.ie/images/uploaded/documents/2004-05-08%20ICEL%20Noreen%20Mackey.pdf> (accessed 21.1.2011)

³¹ Proceedings of the 2008 Fédération Internationale de Droit Européen (FIDE) Congress: J Bornkamm & R Grafunder ‘General Report’ in H Koeck & M Karollus (eds) *The Modernisation of European Competition Law: First Experiences with Regulation 1/2003* (Nomos, 2008) 487-516, 498-499

Notification of an envisaged decision is also a point on which national courts' obligations differ from those of NCAs'. According to Art 15(2)), national court judgments do not have to be notified to the Commission until after they are handed down. Further, the obligation to notify falls to the Member State rather than the court itself. As such, there is only *ex post* notification of a first instance decision, with the result that the Commission could only make an intervention if the case proceeded to appeal, or if it found out about the case through communications with an NCA. This is discussed in more detail in the following chapter.

Under Article 29 Reg 1/2003, a national competition authority may withdraw the benefit of a block exemption in an individual case, pertaining to its own territory, if it constitutes a distinct geographic market. A national court cannot exercise a similar power unless acting in a public enforcement capacity.

The choice of model determines the avenues for communication which national bodies have with the Commission and the Court of Justice. This is important for a number of reasons. One reason is the possibility of advice from a supranational body which oversees the consistent application of EU competition law (or of EU law generally) in different Member States. Another is the nature of advice, and its degree of legal force or formality. A third reason resonates again with interpretative pluralism – at the supranational level, is more than one institution qualified to give advice on the interpretation of the law? The preliminary reference procedure under Article 267 TFEU has been the classical tool for promoting consistent application of EU law.³²

³² K Alter, 'Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration' in A-M. Slaughter, A. Stone Sweet and J.H.H. Weiler (eds), *The European Courts and National Courts: Doctrine and Jurisprudence* (Hart, 1997), 227; T Tridimas 'Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure' (2003) 40 *Common Market Law Review* 9

3. The EU concept of a court or tribunal

The above discussion has considered the potential dual obligations on national competition authorities depending on their designation of ‘judicial’ or ‘administrative’. This section demonstrates the implications of an authority’s designation for its access to the European Commission and the CJEU.

If Article 267 is read literally, only a ‘court or tribunal’ has jurisdiction to address a question to the European Court of Justice.³³ The concept of ‘court or tribunal’ is not defined in the Treaty, hence the Court’s ability to formulate its own concept and control access. Importantly in the context of the designation of competition enforcement bodies under Article 35 Regulation 1/2003, the definition of a ‘court or tribunal’ for the purposes of the preliminary reference procedure is an autonomous EU concept. As affirmed in *Broekmeulen*,³⁴

“if [court or tribunal] were to be construed as a reference to national law, Member States would have it in their power to take away from certain decision-making bodies which have to apply Community law the right, and in some cases the obligation, to request a preliminary ruling, by making provision to that effect within their system of administration of justice. *This would eventually lead to the fragmentation of Community law, which is precisely what the procedure under Article [267] is designed to avoid.* Thus the law of the Member States can be relevant only in so far as that law is able to determine whether the minimum characteristics required by Community law are present in a given case.” (emphasis added)

A-G Reischl favoured throwing the net wide to references to promote coherence. Twenty years later in *De Coster*³⁵, taking the opposite view, Advocate General Ruiz-Jarabo Colomer used his Opinion to criticise and attempt to address the uncertainty of shifting interpretations of what constituted a ‘court or tribunal’. Attempting a clearer formulation and suggesting different criteria for judicial and quasi-judicial bodies, the latter being ‘exceptions’, he proposed a test that “a body that is part of the court system of a Member State which acts independently to decide a case, in accordance with legal criteria, in

³³ M Broberg ‘Preliminary References by Public Administrative Bodies: When are Public Administrative Bodies competent to Make Preliminary References to the European Court of Justice’ (2009) 15(2) European Public Law 207-224; and M Broberg & N Fenger Preliminary References to the European Court of Justice (OUP, 2010) address the shifting interpretations and the width of the Court’s definition over time.

³⁴ Case 246/80 *Broekmeulen v Huisarts Registratie Commissie* [1981] ECR 2311. Opinion of Advocate-General Reischl, at 2336

³⁵ C-17/00 *De Coster v Collège des Bourgmestres et Echevins de Watermael-Boitsfort* [2001] ECR I-9445

adversarial proceedings, *always* constitutes a court or tribunal within the meaning of Art [267].”³⁶ (emphasis added) The exception to the rule is “where no further legal remedy can be pursued and provided that safeguards of independence and adversarial procedure are available.”³⁷

Criteria for assessing whether a body was a court or tribunal were first laid down in *Vaassen-Goebbels*³⁸. Initially the independence requirement was not one of the criteria for assessing admissibility, despite it being a core factor in the judicial function.³⁹ The criteria as they now stand were established in *Dorsch Consult*⁴⁰, a case concerning a German review body for public service contracts. In order for the CJEU to respond to the preliminary reference, the referring body must: be permanent; be a body established by law; apply rules of law; follow an *inter partes* procedure; be independent; and have compulsory jurisdiction. A further criterion is whether the body’s decision is final. Some understand this as being subsumed within compulsory jurisdiction.⁴¹ The finality of the decision was particularly important in *Syfait*, and will be discussed below.

These criteria are not absolute, and not all carry equal weight. The last three in particular – the requirements of independence, *inter partes* procedure, and compulsory jurisdiction leading to a decision of a judicial nature - have been decisive. This is largely because permanence, establishment by law, and applying rules of law, could equally apply to bodies engaged in administrative rather than strictly judicial proceedings. The following discussion will concentrate on these three elements. The main points of contention relating to NCAs, as illustrated in *Syfait*, are organisational independence of the referring body and capability of handing down a final judicial decision, as one element of compulsory jurisdiction.⁴²

³⁶ Opinion of Advocate General Ruiz-Jarabo Colomer in *De Coster*, [85]

³⁷ Opinion of Advocate General Ruiz-Jarabo Colomer in *De Coster*, [95]

³⁸ Case 61/65 *Vaassen-Goebbels* [1966] ECR 261, [273]

³⁹ G Anagnostaras ‘Preliminary Problems and Jurisdiction Uncertainties: the Admissibility of Questions Referred by Bodies Performing Quasi-Judicial Functions’ (2005) 30(6) *European Law Review* 878-890, 884

⁴⁰ C-54/96 *Dorsch Consult Ingenieuresellschaft v Bundesbaugesellschaft Berlin* [1997] ECR I-4961, [23]

⁴¹ For example, Broberg (2009) states that one meaning of compulsory jurisdiction is that the decision must be “binding on the parties”, but he does not mention the finality of the decision.

⁴² Incidentally, later there was a new preliminary ruling to the CJEU referred by the Appeal Court of Athens: C-468/06 - 478/06 *Sot Lelos kai Sia EE v GlaxoSmithKline AEEVE Farmakeftikon Proionton, formerly Glaxowellcome AEEVE* [2008] ECR I-7139, in which there was no issue of admissibility and the substantive questions were answered.

3.1 Inter partes procedure

Inter partes procedure implies due process – particularly that the defendant has the right to be heard, to examine the evidence presented by the opposing party and to answer the opponent’s case. Article 47 of the EU Charter of Fundamental Rights refers to the right to be “advised, defended and represented.” While the principal parties’ (the complainant and defendant) opportunity to present their respective cases seem universally recognised, rights of intervention for other interested parties may vary among courts according to national procedural rules – this does not necessarily render them any less ‘court-like’, as affirmed by Advocate General Jacobs in *Syfait*.⁴³ Particularly in competition proceedings, the complainant who triggered the investigation by the prosecuting competition authority is not necessarily represented in the adjudicative proceedings. The competition authority is the principal party ‘complainant’.

An individual or firm who has lodged a complaint with the Commission shall be “associated closely with the proceedings” (Art 27 Reg 1/2003). The procedure also provides for the hearing (in writing or at oral hearing) of other third parties who have not submitted a complaint but who have sufficient interest in the outcome. The Commission should give the parties the right to be heard before taking a decision. According to Regulation 773/2004 on conduct of proceedings and the handling of complaints notice, once showing that they have a legitimate interest (Art 5 Reg 773/2004), complainant firms may participate by receiving a copy of the statement of objections. The complainant may make views known in writing within a time limit, and the Hearing Officer may allow its views to be heard at an oral hearing (Art 6). However, taking the CJEU’s judgment in *BAT and Reynolds*⁴⁴, the handling of complaints notice at [59] explicitly acknowledges that proceedings are not adversarial between the complainant on one hand and parties on the other, so complainants’ procedural rights fall short of the right to a fair hearing entitled to the companies which are the subject of the complaint.

An indication of the rights specific to competition law proceedings which are relevant for the *inter partes* criterion can be found in a number of provisions, such as Art 27 Reg 1/2003 on the hearing of the defending parties, complainants, consumers and others, the Regulation on conduct of proceedings by the Commission⁴⁵ and the Notice on handling of

⁴³ At [41]

⁴⁴ Case 142 & 156/84 *British American Tobacco & Reynolds v Commission* [1987] ECR 4487 at [19]-[20]

⁴⁵ Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty OJ L 123 , 27.4.2004, 18-24

complaints by Commission,⁴⁶ in the Network Notice and in the recent best practice guidelines on the hearing officer. These provisions concern four main areas: most relevantly the right to be heard; but also rights at the investigation stage, particularly when taking statements; in handling of complaints; and access to the file and treatment of confidential information.⁴⁷

In respect of the right to be heard for defending parties, the Regulation on conduct of proceedings by the Commission provides for the ‘parties concerned’ to have a right to reply to the statement of objections, to be notified in writing with time limits for views, to have the opportunity to attach documentary evidence, and to propose corroborating witnesses (Art 10); decisions should only deal with objections on which parties have been able to comment (Art 11); oral hearing to develop arguments if parties so request (Art 12); hearing of others – Commission may invite parties to oral hearing if those parties received the statement of objections (Art 13); conduct of oral hearings by the hearing officer “in full independence” (Art 14). At the investigation stage: when taking statements the investigator must state legal basis, purpose, that they are voluntary, and recorded (Art 3); Art 4 allows a time limit for the firm to rectify explanations following oral questions during inspections.

The fact that these procedural rights are adhered to in administrative proceedings by the Commission shows that these elements of *inter partes* procedure are not decisive for the definition of a court or tribunal. The significant issue is the interrelation of the *inter partes* and independence criteria. The *inter partes* criterion, implying that both complainants and respondents should be legally represented and enjoy procedural rights, may be weighed relative to the independence of the body in question.⁴⁸

In the CJEU, arguments surrounding the *inter partes* requirement have focused on a third party adjudicating between the prosecutor and defendant. In this respect it is linked to the independence requirement. This is the point upon which due process criticisms of the European Commission itself are based.⁴⁹ The Commission has most recently attempted to

⁴⁶ Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty OJ C 101, 27.04.2004, 65-77

⁴⁷ see Ch 7: ‘Article 6 proofing’ EC competition proceedings?’ in A Andreangeli *EU Competition Enforcement and Human Rights* (E Elgar, 2008) for a full discussion of procedural rights of parties in European Commission competition proceedings.

⁴⁸ Case C-54/96 *Dorsch Consult Ingenieurgesellschaft v Bundesbaugesellschaft Berlin* [1997] ECR I-4961; Joined cases C-110-147/98 *Gabalfrisa and Others* [2000] ECR I-1577; Case C-17/00 *De Coster v Collège des Bourgmestres et Echevins de Watermael-Boitsfort* [2001] ECR I-9445. However, there was no ‘weighing’ in the more recent Case C-96/04 *Standesamt Stadt Niebüll* [2006] ECR I-03561

⁴⁹ See e.g. I Forrester ‘Due Process in EC Competition Cases: A Distinguished Institution with Flawed Procedures’ (2009) 34(6) *European Law Review* 817-843; D Slater, S Thomas, D

address these concerns and ward off full-scale institutional reform by issuing Best Practice guidelines on the Hearing Officer's role and conduct of its hearings.⁵⁰ Plans for a new UK Competition and Markets Authority also place emphasis on checks and balances in an "enhanced administrative model".⁵¹ In the meantime the OFT is consulting on a review of investigation procedures in competition cases⁵² including collective judgement (rather than a decision by a single officer); a senior responsible officer for each case; enhanced legal oversight; contact between the parties and decision-makers; a Procedural Adjudicator; and, most importantly, separation of the investigation team and decision-makers, with separation of individuals authorising the opening of a case and the issuing of a statement of objections and those responsible for making the decision on whether there has been an infringement.

The Court of Justice has affirmed that antitrust proceedings must meet the requirements of Article 6 of the European Convention on Human Rights (ECHR), for example in *Baustahlgewebe*.⁵³ The Art 6(1) ECHR case law has been brought into the debate most frequently in respect of fines imposed for antitrust infringements, which the European Court of Human Rights (ECtHR) has construed as being of a punitive and therefore criminal nature.⁵⁴ Article 6 does not prevent the adoption of such sanctions by an administrative body, but there must be a possibility to bring an appeal before a judicial body that has "full jurisdiction" to review the decision.⁵⁵ In the context of its damages action and the Commission's reinvestigation after the annulment of the Commission's Schneider/Legrand merger prohibition decision, Schneider argued that the Commission is not an impartial authority within the meaning of Art 6 ECHR. In line with previous case law, the General Court found that its own judicial review remedied this lack of impartiality.

Waelbroek 'Competition Law Proceedings before the European Commission and the Right to a Fair Trial: No Need for Reform?' (2008) Global Competition Law Center Working Paper 04/08; P Marsden 'Checks and Balances: EU Competition Law and the Rule of Law' (2009) 22(1) *Loyola Consumer Law Review* 51-60

⁵⁰ Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, OJ L 275, 20.10.2011, 29; Best Practices in proceedings concerning articles 101 and 102 TFEU, OJ C 308, 20.10.2011, 6-32

⁵¹ UK Government response to Department of Business, Innovation and Skills (BIS) consultation at [6.29], 9 in executive summary, 118

⁵² Office of Fair Trading 'Review of the OFT's Investigation Procedures in Competition Cases: A Consultation Document', OFT1263con2, March 2012 available at http://www.offt.gov.uk/shared_offt/policy/OFT1263con2, (accessed 17.4.2012)

⁵³ Case 185/95 P *Baustahlgewebe v Commission* [1998] ECR I-8417 – this turned on the requirement for a hearing 'within a reasonable time' rather than squarely on the independent and impartial tribunal requirement.

⁵⁴ Article 6(1) ECHR: "In the determination of civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law"

⁵⁵ E.g. *Janosevic v Sweden* [2002] 38 EHRR 22 concerning a tax authority investigating taxi operators.

The Commission was not bound to send the case back to a different authority, or to a differently composed branch within the Commission.⁵⁶

This contrasts with the European Court of Human Rights' understanding in *Dubus SA v France*⁵⁷ concerning the French Banking Commission. There the ECtHR ruled that there must be no prejudgment about guilt, and the authority must avoid even the *impression* that guilt had been established at the start of the procedure. The practical effect was that the department may need to be reorganised in order to separate the investigative and adjudicative roles currently exercised by the same people.

Previous case law has followed a trend that Article 6 would not be violated where the second tier body reviewing an administrative decision had "full jurisdiction". More recent case law of the ECtHR has tightened up this 'compensation' by a second tier tribunal. In *Tsfayo v UK*⁵⁸ the ECtHR ruled that where the review court was considering a *finding of fact* rather than an *exercise of administrative discretion*, judicial review could *not* remedy the lack of independence at first instance since the review court did not have the capacity to make its own findings of fact. One can consider how this might apply in competition cases. A finding of fact could, for instance, be a finding of foreclosure. Whether a court could revisit such a finding was the subject of the UK *Crehan*⁵⁹ case, explored in more detail in the following two chapters.

The full jurisdiction issue arose again recently in respect of a fine imposed by the Italian competition authority on a pharmaceutical company in *Menarini*.⁶⁰ The ECtHR ruled that the judicial review must be able to *re-examine*, if not substitute, the administrative authority's findings – that is, investigate the substantive decision as well as the fine imposed.⁶¹ On the facts the Court dismissed the claim that the Italian system of judicial review was incompatible with Art 6 ECHR.

Following *Menarini*, the CJEU is already couching its judgments differently. It is relatively unproblematic that Art 261 TFEU and Art 31 Regulation 1/2003 allow for unlimited jurisdiction with regard to fines. However, the Court's formulation of its standard of review with regard to findings of fact on which those fines are based has become stricter.

⁵⁶ T-351/03 *Schneider Electric v Commission* [2007] ECR II-2237 at [181]-[186], [188]

⁵⁷ *Dubus SA v France*, Application no 5242/04, judgment of 11.6.2009

⁵⁸ *Tsfayo v UK* [2009] 48 EHRR 18; [2006] All ER (D) 177, judgment delivered on 14.11.2006, concerning the UK Housing Benefit and Council Tax Benefit Review Board.

⁵⁹ *Inntrepreneur v Crehan* [2006] UKHL 38

⁶⁰ *Menarini Diagnostics SRL v Italy*, Application no 43509/08, 27.9.2011

⁶¹ *Menarini* [63]-[66]

In its judgment in the *KME/Chalkor* appeal,⁶² the CJEU stated that in a review of legality “the Courts cannot use the Commission’s margin of discretion...as a basis for dispensing with the conduct of an in-depth review of the law and of the facts.”⁶³ Despite referring to the manifest error of assessment standard, denoted by the General Court’s references to ‘discretion’, the ‘substantial margin of discretion’ or the ‘wide discretion’ of the Commission, “such references did not prevent the General Court from carrying out the *full and unrestricted review, in law and in fact, required of it.*”⁶⁴ [emphasis added]

The ECtHR’s case law has traditionally been stricter than CJEU case law on the question of independence, since Art 6(1) refers to an independent *and impartial* tribunal. ‘Impartiality’ implies a stronger type of independence, not only structural. In *McGonnell v UK*⁶⁵, it was not necessary to prove lack of independence *and* impartiality, only to show circumstances “casting doubt” on impartiality or “legitimate grounds for fearing” that the court may be influenced by what happened at an earlier stage in proceedings.

Tridimas argues that using the Art 6 ECHR case law is not appropriate to define a court or tribunal for the purposes of the preliminary reference procedure.⁶⁶ First, the Art 6 definition arises in the context of claim that Art 6 has been infringed and that an injustice has occurred. In receiving a preliminary reference, the CJEU is not ruling on that. Secondly, the CJEU would need to consider and pass judgment on national laws and procedures incidental to the litigation, beyond its jurisdiction. Finally, it does not necessarily enhance judicial protection to exclude some bodies, particularly if there is no guarantee that an opportunity for a reference would arise at subsequent stage, for example from a review court.

In the CJEU’s case law the *inter partes* criterion can be weighed against the independence of the referring body⁶⁷ For example, if the parties do not have extensive rights to plead their case, but the decision-making body is separate from the executive investigative body, it may still qualify as a court or tribunal. In *De Coster*, the Advocate General referred to the “diminishing importance of the *inter partes* requirement”⁶⁸ – for example, the CJEU had

⁶² C-389/10 P *KME Germany and Others* [2011] ECR I-0000, judgment of 8.12.2011, not yet reported

⁶³ *KME Germany* [129]

⁶⁴ *KME Germany* [136]

⁶⁵ *McGonnell v UK* [2000] 30 EHRR 289

⁶⁶ T Tridimas ‘Knocking on Heaven’s Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure’ (2003) 40 *Common Market Law Review* 9-50, 31-32

⁶⁷ T Tridimas ‘Knocking on Heaven’s Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure’ (2003) 40 *Common Market Law Review* 9-50, 27; G Anagnostaras ‘Preliminary Problems and Jurisdiction Uncertainties: the Admissibility of Questions Referred by Bodies Performing Quasi-Judicial Functions’ (2005) 30(6) *European Law Review* 878-890

⁶⁸ A-G Colomer’s opinion at [29]

overlooked it in *Dorsch Consult*. In *Gabalfrisa* (1999), Advocate General Saggio noted that the referring body's lack of *inter partes* procedure is not on its own sufficient ground for excluding its status as a court or tribunal. However, where the *inter partes* element was lacking ("in summary proceedings where the defendant was not present"), the reference would only be allowed where it was "offset by a high level of impartiality and independence in the adjudicating body."⁶⁹

3.2 Independence

As noted above, surprisingly the feature one might most associate with the judicial function – independence – was not raised as a factor until 1987⁷⁰. It was eventually defined in *Corbiau*⁷¹ (1993): the body submitting a preliminary question should act as a "third party in relation to the authority which adopt[s] the decision forming the subject-matter of the proceedings". That is, would the adjudicative part of the authority have jurisdiction to decide a case between its own secretariat and a defendant? There would have to be *no* organisational link in order for the referring body to constitute a third party in relation to those involved in the dispute. This strict view of independence focuses on perceived and actual impartiality – the body in question must be independent and *seen* to be independent. This view of independence resonates with the case law on Article 6(1) of the European Convention on Human Rights, as discussed above. This formalistic approach is more strict than before or since until *Syfait*.

The independence criterion suggests both structural and operational elements, in which the referring body must act as a third party towards the administration. There are two elements to the question of independence of competition authorities: the individual independence of adjudicative panel members; and organisational independence, implying a lack of structural link with the investigative administration.

The Court in *Dorsch Consult* in which the Public Procurement Awards Supervisory Board was organisationally linked to the Bundeskartellamt and the Ministry for Economic Affairs, did not apply this third party criterion, stating that the body should only have the objective of carrying out its task "independently and under its own responsibility". Consider the position of NCAs who only report to their Parliament rather than through a Ministry, for example – they would meet the independence criterion.

⁶⁹ A-G Saggio's Opinion at [14]

⁷⁰ Case 14/86 *Pretore di Salò v Persons unknown* [1987] ECR 2545 [7]

⁷¹ C-24/92 *Corbiau* [1993] ECR I-1277 [15]

Moving towards a more functional approach of operational independence, the Court placed emphasis on legal safeguards in national law that guaranteed the referring body's performance of its duties without administrative interference, even though the composition of the referring authority was determined by a body subject to ministerial supervision.

In *Gabalfrisa* the CJEU placed particular focus on the relevant Spanish domestic law ensuring a separate of functions between the departments of the tax authority charged with recovery and management of taxes, and the *Tribunales* ruling on complaints lodged against the decisions of those departments. The *Tribunales Economico-Administrativos* were held to be third parties in relation to the State authority responsible for value added tax. This implies that in order to gain the status of a 'court or tribunal' for the purpose of the Article 267 procedure, there needs to be an absence of hierarchical links with the administration. In this respect the CJEU distinguished its judgment in *Corbiau*, where the *Directeur des Contributions Directes et des Accises* (head of the Direct Taxes and Excise Duties Directorate) was not considered to be a third party.

On the question of individual independence, in *Gabalfrisa* the *Tribunales Economico-Administrativos* did not officially belong to the justice department but were incorporated into the *Ministerio de Economica y Hacienda*. The Minister could remove members of the Tribunal from office, under circumstances which are not sufficiently clearly defined for the Advocate General. Nonetheless the CJEU allowed the reference. The *Gabalfrisa* approach was criticised by AG Colomer in *De Coster* for not having due regard to impartiality in terms of individual independence of its members, and in *Syfait* the Court distinguished its judgment from *Gabalfrisa*.

*Schmid*⁷²(2002) also considered the admissibility of a question by an (Austrian) appellate tax authority, focusing on whether it was a third party and whether its procedure was *inter partes*. In contrast, the court did not consider the tribunal to be independent given that there was an overlap in membership between the administrative side of the authority and the appeal chamber – two of the five members of the appeal chamber belonged to the tax authority. The President, himself directing the tax authority as well as being a member of the appeal chamber, had the power to nominate members and there was no legislative provision preventing him from modifying its membership. The President, under the direction of the Finance Minister could also bring an appeal/statutory judicial review

⁷² Case C-516/99 *Schmid* [2002] ECR I-4573

against a decision of the appeal chamber. The difference appears to be the effect of the domestic rules on separation of functions.

Subsequently Advocate General Colomer in *De Coster*⁷³ attempted to reassert the earlier understanding of independence as “equidistance from the parties to the case and from the subject matter of the dispute”. This implies freedom in relation to superiors in the hierarchy, the executive - government bodies, other national authorities, and perhaps more tenuously, social pressures. He argued that a *general* principle of non-interference in the actions of administrative bodies of the State is not sufficient to corroborate status of a court or tribunal, and that there must be clear and specific provisions for withdrawal, rejection and dismissal of its members.

The independence criterion is discussed in more detail in relation to *Syfait* below.

3.3 Compulsory jurisdiction

There can be different interpretations of compulsory jurisdiction, both from the perspective of the parties and the court. It suggests there is no other judicial forum for the dispute in question. One interpretation is that the *parties* have no other forum under law to resolve their dispute. As shown below, this resonates with Advocate General Jacobs’ definition in *Syfait* – since the HCC had sole competence to impose the penalties under Law 703/77, the parties could only come under the forum of the HCC.⁷⁴ This perspective on compulsory jurisdiction is also the reason why preliminary references from arbitral tribunals are excluded, since the parties can choose that forum⁷⁵

The second interpretation is whether it is compulsory *on the part of the adjudicating body* to take up a case or to give a decision. I would argue that this is the defining feature of a competition authority as opposed to a court. As noted above, competition authorities may prioritise their resources and decide whether or not to investigate, whereas courts are constrained by the ambit of the dispute as brought by the parties.

⁷³ [93] et seq

⁷⁴ The civil courts are not *prima facie* entitled to rule on the application of the provisions of Law 703/77 on the Control of Monopoly, Oligopoly and the Protection of Free Competition [national provisions equivalent to Art 101, 102 TFEU and merger regulation], but can hear follow-on actions for damages as the HCC is not empowered to award them. See e.g. Global Competition Review *Getting the Deal Through: Cartel Regulation* (2005)

⁷⁵ Case 102/81 *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co KG* [1982] ECR 1095

A third element of compulsory jurisdiction is whether the body has competence to make *final* legal determinations and to impose penalties⁷⁶. Even in competition authorities with a dualist structure (types B and C above), the requirement of finality is not straightforward when one considers the potential for appeal or judicial review of the decision. This final element in particular was relevant in the context of *Syfait* and the possibility for the European Commission to relieve an NCA of its competence under Article 11(6) Regulation 1/2003.

4. The *Syfait* case and its implications

4.1 *Syfait* facts

*Syfait*⁷⁷ was the first preliminary reference from a competition authority to come before the Court following the 2004 reforms. It therefore gives a good indication of how the CJEU intends to deal with NCAs, and the implications for agencies of different designs. The reference in question was submitted by the Hellenic Competition Commission (Epitropi Antagonismou) to the CJEU before Regulation 1/2003 came into force,⁷⁸ but judgment was given on 31 May 2005.

Syfait was an association of pharmacists and pharmaceutical wholesalers on the Greek market, supplied by GlaxoSmithkline, the pharmaceutical manufacturer. Prices in Greece were fixed at a low level by State intervention. *Syfait* exported a proportion of the products to other Member States, where prices were significantly higher, allegedly precipitating a shortage on the Greek market due to quota restrictions also imposed by the Greek government. GlaxoSmithKline therefore started selling directly to hospitals and pharmacies and ceased to meet *Syfait*'s orders in full. The questions referred by the Hellenic Competition Commission concerned potential abuse of a dominant position under Article 102 TFEU and the circumstances in which a dominant manufacturer could justify a supply restriction, given the State intervention on national pricing levels.

⁷⁶ First established in Case 138/80 *Borker* [1980] ECR 1975 [4], concerning the Paris Bar Council. The Council could only give legally binding decision on its internal matters. The reference concerned one of its members being forbidden from pleading in a German court, over which the Council had no jurisdiction. This links with the Court's jurisprudence that the preliminary reference must relate to a genuine dispute which the referring body has jurisdiction to resolve.

⁷⁷ C-53/03 *Synetairismos Farmakopion Aitolias & Akarnanias v GlaxoSmithkline Plc* [2005] ECR I-4609

⁷⁸ On 22 January 2003: Reference for a preliminary ruling by the Epitropi Antagonismou in the case of C-53/03 *Sinetairismos Farmakopion Aitolias & Akarnanias — Syfait and Others against Glaxowellcome Aeve* (subsequently called *Glaxosmithkline Aeve*), C 101/30, 26.4.2003, 18

However, in the event the CJEU did not address the substantive issues. Although Advocate General Jacobs decided the Hellenic Competition Commission qualified as a ‘court or tribunal’, the CJEU disagreed, declaring the reference inadmissible on the grounds that the Competition Commission was not sufficiently independent and that the proceedings were not intended to lead to a decision of a judicial nature.

4.2 Independence

4.2.1 The opinion of Advocate General Jacobs

Advocate General Jacobs ultimately declared the reference admissible, but was not without doubts. These centred on the structural links between the Competition Commission – that is, the adjudicatory arm of the HCC as a whole - and its secretariat. Particularly important was the role of the HCC President and of Ministerial supervision. The President directed the secretariat, which was responsible for investigating cases and making proposals to the Board of the Commission. However, the President did not take part in drafting such proposals. The President also held disciplinary powers over secretariat staff, and over the other members of the Board (an issue particularly emphasised in the CJEU’s judgment).⁷⁹ The Minister of Development appointed the President.

His Opinion rested on the independence criterion, and its relatedness with the *inter partes* procedure. The other factors “whilst probably necessary for any judicial authority, would equally apply to an administrative enforcement agency.”⁸⁰ Hence, they were necessary but not sufficient to secure the status of ‘court or tribunal’. In his view the HCC appeared to be “situated very close to the borderline between a judicial authority and an administrative authority having certain judicial characteristics.”⁸¹

⁷⁹ The composition and independence of the Hellenic Competition Commission has since undergone revision. A revision of Law 703/1977 on Competition was adopted by the Greek Parliament on 12 April 2011. The President and the newly introduced post of Vice-President are now appointed by the Parliament. Previously an HCC member who submitted a reasoned opinion following an investigation by the directorate also had the right to vote on a decision by the adjudicative branch of the HCC, and this provision has now been abolished. In addition, all members are to be exclusively employed by the HCC, rather than holding other posts simultaneously. Members are appointed for a three-year term, renewable once. Specialist chambers of the Athens Administrative Court of Appeals now have competence to review competition cases.

⁸⁰ AG Jacobs’ Opinion at [21]

⁸¹ AG Jacobs’ Opinion at [31]

While finding that the Greek Competition Commission met most of the criteria for a ‘court or tribunal’, Advocate General Jacobs acknowledged that there was a fine balance on the point of organisational independence. He took into account three points: (a) in practice the President’s disciplinary power over the secretariat would not be likely to influence the conduct of any given investigation;⁸² (b) there were sufficient procedural safeguards during the hearing stage to allow all parties to present their case which outweighed the possible threat of disciplinary power in (a); and (c) the persuasive precedent value of the reference from the Spanish competition authority, the Tribunal de Defensa de la Competencia Spanish banks case.⁸³ This underlines how the *inter partes* and independence criteria are interrelated. The AG concluded that the reference from the Greek Competition Commission was admissible.⁸⁴

The Advocate General took a somewhat formalistic approach in assessing whether the Competition Commission was “judicial in nature” by focusing on how many of its board members were qualified lawyers or judges.⁸⁵ The rules stipulated that there should be two lawyers out of a total of nine members on the Commission. However, two further posts were to be held by people with experience of national and EC economic law and competition policy. “...in a technical field such as competition law there is a need for economic and commercial expertise alongside legal qualifications.”⁸⁶ Members are explicitly required to exercise their authority in accordance with the law. This relates to the individual independence of members of the board, who are “bound...only by the law and their conscience”, and shall “enjoy personal and operational independence” according to Article 8(1) of Law 703/77. Although admissibility is judged on the Community concept of a court, the national rules on composition of the authority are indicative, as shown in the previous case law outlined above.

The Advocate General showed the interrelatedness of the criteria in considering how the possibility for an *inter partes* hearing could offset the independence issue: “More distinctive of a court or tribunal is the hearing before the Competition Commission, at which both complainants and respondents may be legally represented and are accorded procedural rights similar to those enjoyed by parties to ordinary court proceedings. Such guarantees go some way to supplying the necessary *inter partes* element to the Competition Commission’s decision-making process.”⁸⁷ “The issue at stake appears to me

⁸² AG Jacobs’ Opinion at [34]

⁸³ C-76/91 *Asociacion Espanola de Banca Privada and Others* [1992] ECR I-4785

⁸⁴ AG Jacobs’ Opinion at [46]

⁸⁵ AG Jacobs’ Opinion at [26]

⁸⁶ AG Jacobs’ Opinion at [33]

⁸⁷ AG Jacobs’ Opinion at [21]

to be closely related to the question whether the procedure of the Competition Commission can be qualified as *inter partes* in nature. Only if the secretariat has the necessary degree of separation from the Competition Commission can it qualify as a third party independent of both the party being investigated and of the Competition Commission as judge.”⁸⁸ The complainants had argued that interested parties were not able to intervene in proceedings before the HCC, and therefore there were insufficient procedural rights for the HCC to rank as a court or tribunal.⁸⁹ The Advocate General rejected this argument by noting that the complainants had been able to participate by lodging their complaint in the first place. More generally, “judicial bodies may legitimately vary in the degree to which they allow an interested third party to intervene in the proceedings without thereby jeopardising their status as a court or tribunal”.⁹⁰

I would submit that Spanish tribunal in Spanish banks was a type B authority, whereas the HCC was type A. If there were a sliding scale in terms of the three configurations above, type A would be least likely to qualify and a court in type C most likely to be granted access.

Although it has not been identified by other commentators, whether it is compulsory *on the part of the adjudicating body* to take up a case or to give a decision seems the most obvious reason why an integrated national competition authority may not have compulsory jurisdiction. Such NCAs have the discretion to prioritise resources and to select their cases.⁹¹ Even if a complainant reports a firm, the NCA can decide whether or not to open an investigation. A true court only has jurisdiction in the ambit of the dispute brought by the parties.⁹² The only way the adjudicatory arm of an integrated authority could have compulsory jurisdiction in this way would be if national rules gave it no discretion to act on the advice of the secretariat. Then the relevant question would be whether the adjudicatory arm was sufficiently separate from the investigating secretariat, as considered under the independence criterion. This includes courts in a public enforcement capacity in duality type B or C configurations as they rely on the prosecuting competition authority to bring a case.

⁸⁸ AG Jacobs’ Opinion at [29]

⁸⁹ AG Jacobs’ Opinion at [30]

⁹⁰ AG Jacobs’ Opinion at [41]

⁹¹ See T-24/90 *Automec v Commission* [1992] 5 CMLR 431 in respect of the European Commission

⁹² Joined Cases C-430 and 431/93 *Van Schijndel* ECR [1995] I-4705

4.2.2 *The judgment of the Court*

In rejecting the reference, the Court's judgments rested on independence, and proceedings leading to a final decision. The Court focused on issues of structure and rules of appointment, and did not consider procedural rules and the decision-making process as explored by the Advocate General.

Significantly, the Court's addition to the *Dorsch Consult* criteria outlined above was that a court can refer only "if there is a case pending before it, and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature".⁹³ The contrast with the Advocate General's understanding of "whether its final decision is judicial in nature"⁹⁴ could be a reason for their diverging conclusions.

In assessing the independence of the national competition authority, three factors were relevant. First, the Court noted that the HCC was under the supervision of the government Minister for Development, which the Court considered meant that he could under certain conditions review the lawfulness of the HCC's decisions. This point was not stressed in the AG's Opinion.⁹⁵

Secondly, the Court considered the terms of appointment of members of the Competition Commission. Although according to the relevant national law they were only bound by "the law and their conscience" and enjoyed "personal and operational independence",⁹⁶ this was undermined by the President's disciplinary powers. There were insufficient specific effective safeguards concerning their dismissal or termination of employment, and therefore was "no effective safeguard against undue intervention or pressure from the executive".⁹⁷ In addition, the President exercised disciplinary control over the secretariat personnel,⁹⁸ a fact linked to the third factor.

Third, concerning the Commission as a whole, there was an operational link between the Competition Commission as a decision-making body and its secretariat as a fact-finding body upon whose proposals it adopted decisions. The President was responsible for co-

⁹³ *Syfait* judgment at [29], citing C-134/97 *Victoria Film* [1998] ECR I-7023, [1999] 1 CMLR 279 at [14] and C-195/98 *Österreichischer Gewerkschaftsbund* [2000] ECR I-10497, [2002] 1 CMLR 14 at [24] in support

⁹⁴ Citing Case 138/80 *Borker* [1980] ECR 1975, [1980] 3 CMLR 638 at [4]; C-111/94 *Job Centre* [1995] ECR I-3361 at [9]; and C-182/00 *Lutz and Others* [2002] ECR I-547 at [15]-[16] in support

⁹⁵ *Syfait* judgment at [30]

⁹⁶ Art 8(1) of Law 703/77

⁹⁷ *Syfait* judgment at [31] citing C-103/97 *Koellensperger and Atzwanger* [1999] ECR I-551 at [21] in support

⁹⁸ *Syfait* judgment at [32]

ordinating general policy and directing the secretariat, which in turn carried out investigations and made proposals to the Commission, to the extent that the Court did not consider it to be “a clearly distinct third party” vis-à-vis the secretariat.⁹⁹ Whereas the Advocate General thought that this power over the secretariat did not matter as long as there were safeguards for the parties which were the subject of the Commission’s investigation at the hearing stage, the Court did not take into account this trade-off between the *inter partes* and independence requirements.

The Court characterised the secretariat as a “State body” – presumably, part of the executive – “which may be akin to a party in the course of competition proceedings.”¹⁰⁰ This element emphasises the need for the adjudicating body’s third party *equidistance* between the parties to the dispute: that is, the prosecuting authority and the respondent firm(s). The key point is whether the Competition Commission as secretariat could qualify as a third party independent of the Competition Commission as ‘judge’ and of the party which is the subject of its investigations. Put another way, it would not be possible for the secretariat of the Competition Commission to act against the Commission as a judicial panel.

The tribunal must be independent of both the executive and the litigants. On this point the CJEU distinguished its judgment in *Gabalfrisa*¹⁰¹, in which the *Tribunales Economico-Administrativos* of Spain were held to be third parties in relation to the State tax authority responsible for VAT. For the CJEU in *Gabalfrisa* the relevant point was that the final decisions of the *Tribunales* could not be overturned or modified by the Administration except in cases of automatic nullity or special proceedings for revision.¹⁰² This links the concepts of organisational independence and final judicial decision.

Although the definition of a court or tribunal for the purposes of Article 267 is an autonomous EU concept,¹⁰³ in practice the body’s treatment in the national statutory framework appears to be a strong evidentiary basis. The Competition Commission was not among the five independent domestic authorities whose membership was defined by constitutional provisions. In *Syfait* the Competition Commission was classified under national law as an independent authority, but in practice it did not offer sufficient protection against administrative interference. The Competition Commission was not among the bodies covered by specific provisions in Greek constitutional law.

⁹⁹ *Syfait* judgment at [33]

¹⁰⁰ *Syfait* judgment at [33]

¹⁰¹ C-110-147/98 *Gabalfrisa and Others* [2000] ECR I-1577; [2002] 1 CMLR 13 at para 33

¹⁰² *Syfait* judgment at [28]

¹⁰³ *Syfait* judgment at [29]

4.3 Compulsory jurisdiction and a (final?) decision of a judicial nature

The question of independence could relate to any quasi-judicial body. It is the Court's reasoning that there must be a case pending before it and the proceedings must be *intended to lead* to a decision of a judicial nature that is more specific to competition authorities.¹⁰⁴

As noted above, this can be viewed as one element in the referring body's compulsory jurisdiction. The Advocate General did not find it necessary to go into detail on whether the HCC's jurisdiction was compulsory leading to a final legal decision, simply noting that it had sole competence to impose penalties as provided for under the Greek national law.¹⁰⁵ This resonates with the first interpretation of compulsory jurisdiction, that the *parties* have no other forum under law to resolve their dispute. In his identification of the 'court or tribunal' criteria, the issue of whether the entity's final decision is judicial in nature¹⁰⁶ was not explicitly addressed.

Specifically, the Advocate General did not address the operation of Article 11(6), which the court ultimately found decisive. The CJEU held that the HCC's proceedings did not lead to a decision of a judicial nature as there was the potential for the European Commission to relieve the HCC of its jurisdiction pursuant Article 11(6) Regulation 1/2003.¹⁰⁷

The Court's judgment on this point is very brief, but this is the point at which the Court of Justice apparently constrains its own jurisdiction over the interpretation and application of EU competition law. As such several elements need to be examined.

¹⁰⁴ *Syfait* judgment at [29]

¹⁰⁵ AG Opinion at [20], referring to Law 703/77 on the control of monopolies and oligopolies and protection of free competition. The Greek civil courts could only hear follow-on actions.

¹⁰⁶ Citing Case 138/80 *Borker* [1980] ECR 1975, [1980] 3 CMLR 638 at [4]; C-111/94 *Job Centre* [1995] ECR I-3361 at [9]; and C-182/00 *Lutz and Others* [2002] ECR I-547 at [15]-[16] in support

¹⁰⁷ *Syfait* judgment at [34]

4.4 Does *Syfait* bar all NCAs from preliminary references?

Syfait appears to lock the door of the Court to all NCAs.¹⁰⁸ An argument in support of that view is that the court refers to “a competition authority *such as* the Epitropi Antagonismou” being required to work in close cooperation with the European Commission.¹⁰⁹ Since all competition authorities work with the Commission in the ECN, it appears to cover all of them. An alternative interpretation is that it only refers to integrated agencies – that is, those with a structure ‘such as’ the HCC’s.¹¹⁰ As will be shown, this has an impact both on the independence criterion, and regarding the effect of Article 11(6) on an authority’s capacity to come to a ‘final decision of a judicial nature’.

The first point is that the Court states that “Whenever the Commission relieves a national competition authority such as the Epitropi Antagonismou of its competence, the proceedings initiated before that authority will not lead to a decision of a judicial nature.”¹¹¹ However, the national competition authority would only be relieved of its competence if the Commission actually did activate Article 11(6). The Court’s finding is therefore predicated on a hypothetical possibility. In practice, the Commission has been reluctant to take over jurisdiction in this way.¹¹²

Secondly, the assertion that “the competition authorities of the Member States are *automatically* relieved of their competence where the Commission initiates its own proceedings”¹¹³ is taken from recital 17 of Regulation 1/2003. However, the Court did

¹⁰⁸ See e.g. Anagnostaras who argues that it amounts to a blanket exclusion of Member State NCAs from the Article 267 procedure: G Anagnostaras ‘Preliminary Problems and Jurisdiction Uncertainties: the Admissibility of Questions Referred by Bodies Performing Quasi-Judicial Functions’ (2005) 30(6) *European Law Review* 878-890

¹⁰⁹ *Syfait* judgment at [34]

¹¹⁰ For example, all Irish civil courts are designated competition authorities for the purposes of Art 35 Regulation 1/2003 and, whilst they are subject to its rules, they are not directly involved in the fora of the ECN.

¹¹¹ *Syfait* judgment at [36]

¹¹² Interview material reported in H Kassim and K Wright ‘The European Competition Network: a Regulatory Network with a Difference’ Paper presented at European Consortium for Political Research (ECPR) Standing Group on Regulatory Governance, Third Biennial Conference, Dublin, 17-19 June 2010. Commission officials have expressed reluctance about invoking Art 11(6). One interviewee remarked that: “the worst case scenario would be the Commission intervening all the time”. The use of Article 11 (6) as a “cherry picking provision” would not only generate unnecessary work, but could lead to a breakdown in trust that would jeopardize the operation of the network. One national official said that they “almost had to persuade the Commission to take over a case” where three or more Member State markets were involved. According to the 2008 FIDE report (J Bornkamm & R Grafunder ‘General Report’ in H F Koeck & M M Karollus (eds) *The Modernisation of European Competition Law: First Experiences with Regulation 1/2003* (Nomos: Vienna 2008), 487-516), in at least one case, even though three NCAs were investigating, the Commission did not take over the case as might be expected according to the guideline example in the Network notice, but the NCAs coordinated the investigation amongst themselves.

¹¹³ *Syfait* judgment at [34], emphasis added

not look into other provisions of Regulation 1/2003, in particular Article 35. That article reveals more nuanced effects. Pursuant to Article 35(3), the effects of Article 11(6) do apply fully to courts which “exercise functions regarding the preparation and adoption of the types of decisions foreseen in Article 5” – that is, requiring that an infringement be brought to an end; ordering interim measures; accepting commitments; or imposing fines, periodic penalty payments or any other penalty provided for in their national law. However, Article 35(4) guarantees the independence of courts as competition authorities where the judicial authority is “separate and different” from the prosecuting authority. Under Article 11(6), the Commission is limited to taking over a case from a prosecuting authority, which should in turn withdraw its claim from the judicial authority.

Article 11(6) further states that “if a competition authority of a Member State is already acting on a case, the Commission shall only initiate proceedings *after consulting with the national competition authority*” and, further “if the NCA(s) concerned do not object”¹¹⁴. Given the lack of dispute resolution proceedings regarding case allocation in the ECN, could the Commission legally and politically enforce this? Arguably infringement proceedings against the Member State under Art 258 TFEU would be disproportionate, and would certainly undermine mutual trust within the ECN among competition enforcers.¹¹⁵

This lends weight to the argument that it is the prosecuting authority’s decision to abandon proceedings, rather than the Commission’s competence, which leads to the termination of proceedings in the judicial branch, as Brammer argues.¹¹⁶ If the prosecuting authority does not take such a decision, theoretically the proceedings in the judicial authority could continue. The Commission’s power to relieve a national authority of its competence is therefore indirect.

This is where the compulsory jurisdiction criterion meets the Court’s findings on independence. If the HCC’s decision-making body was not sufficiently separate from its investigating secretariat, it would be difficult for the secretariat to “withdraw its claim” in its advisory role to the HCC board.

¹¹⁴ Network notice [54(e)]

¹¹⁵ See e.g. H Kassim & K Wright ‘Network Governance and the European Union: the Case of the European Competition Network’, paper presented at the Institute of European Law Conference, ‘After the First 50 Years: The Future of European Law and Policy’, University of Birmingham, 2-4 July 2008, based on original interview research.

¹¹⁶ S Brammer ‘Co-operation Between National Competition Agencies in the Enforcement of EC Competition Law’ (Hart, 2009) 96

Thirdly, the Court states that Article 11(6) “essentially maintains the rule in Art 9(3)¹¹⁷ of Regulation 17”.¹¹⁸ While the Court seems keen to preserve continuity of the former enforcement regime, in the pre-2004 system under Regulation 17¹¹⁹ there was no such distinction between prosecuting and judicial functions of an authority.

*BRT v SABAM*¹²⁰ recognises courts as “authorities of the Member States” for the purposes of Art 9(3) in addressing courts’ authority to act under that provision. However, it makes a distinction between those courts whose primary function is enforcement under Art 88 EEC, that is, as an NCA involved in public enforcement¹²¹ and those courts applying ex Arts 85 and 86 EEC by virtue of their direct effect, or in private enforcement. Art 9(3) refers only to the former, public enforcers.¹²² Interesting, the judgment also refers in the first category to Member State authorities tasked with ensuring the legality of that application by the administrative authorities – this suggests that review courts would be relieved of their competence,¹²³ a point which Brammer does not address. The jurisdiction of review courts is now explicitly protected under Art 35(3) Regulation 1/2003.

Courts involved in private enforcement retained their competence so as not to deprive individuals of their rights under the Treaty,¹²⁴ but were encouraged to stay proceedings awaiting the outcome of the Commission’s action.¹²⁵ Importantly, “the competence of such a court to refer a request for a preliminary ruling to the Court of Justice cannot be fettered by Article 9 of Regulation no 17.”¹²⁶ This seems to be the distinction which the Court is adhering to in its *Syfait* judgment so as to reserve access to ‘true’ courts.

However, *BRT v SABAM* does not deal fully with the consequences of authorities with investigating, prosecuting and adjudicating functions. In addition, Art 9(3) begins from the

¹¹⁷ “As long as the Commission has not initiated any procedure under Articles 2 [negative clearance], 3 [requiring infringement be brought to an end] or 6 [exemption decision pursuant to 85(3)], the authorities of the Member States shall remain competent to apply Article 85 (1) and Article 86 in accordance with Article 88 of the Treaty ; they shall remain competent in this respect notwithstanding that the time limits specified in Article 5(1) and in Article 7(2) relating to notification have not expired.”

¹¹⁸ Judgment at [34]

¹¹⁹ Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty [1959-1962] OJ 13, 21.2.1962, 204/62

¹²⁰ C-127/73 *BRT v Sabam (No 1)* (1974) ECR 51 at [14]-[19]. The case confirmed the direct effect of the Treaty’s competition provisions, meaning that rights and duties conferred by EU law can be relied upon between individuals in national courts.

¹²¹ *BRT v SABAM* at [18]

¹²² See in this respect S Brammer ‘Co-operation Between National Competition Agencies in the Enforcement of EC Competition Law’ (Hart, 2009) 124-125

¹²³ *BRT v SABAM* at [19]

¹²⁴ *BRT v SABAM* at [17], [20]

¹²⁵ *BRT v SABAM* at [21]

¹²⁶ *BRT v SABAM* at [23]

starting point that the Commission had jurisdiction under the pre-2004 regime, and the Member State authorities had *residual* power to act, rather than being 'relieved' of their competence. Regulation 1/2003 operates on a system of parallel competences. Given the notion of the 'well-placed to act authority' in Article 11 Regulation 1/2003 and the Network Notice, DG COMP is only likely to take over jurisdiction if more than three Member States are affected; where it is closely linked to other Community provisions which may be exclusively or more effectively applied by the Commission; if Community interest so requires, to develop Community competition policy, for example where a novel issue arises; or to ensure effective enforcement throughout the Community.¹²⁷

The fourth element to be considered regarding the Court's stance in *Syfait* on a decision of a judicial nature is that the need for a 'final' decision is not mentioned. Indeed, the requirement of finality is not straightforward when one considers the potential for appeal or judicial review of the decision.¹²⁸ The implication is that a decision of a judicial nature is a first instance decision which is binding and capable of imposing sanctions, albeit subject to appeal. It could be argued that this also implies that a decision of the European Commission following an investigation is a decision of a judicial nature, despite the Commission having a very similar structure to that of the national competition authority. However, previous case law, and the due process debate surrounding the compatibility of Commission procedures with Art 6 ECHR, show that the Commission itself does not fulfil the court or tribunal criteria.¹²⁹

One way of dealing with the issue of a decision of a judicial nature is to focus on whether the jurisdiction was *initially* compulsory, rather than the result. That is, were other possible fora exhausted before the proceedings arrived at the body referring the preliminary question? In *Gabalfrisa*, whereas the Advocate General focused on decisions of the Tribunales being subject to appeal in the administrative courts, the CJEU concentrated on the element of *exhaustiveness* in proceedings and allowed the reference. Decisions of the tax authority could be challenged in the administrative courts only after proceedings have been completed in the Tribunales Economico-Administrativos: no other forum. In that sense their jurisdiction was compulsory. By analogy, decisions of integrated NCAs can only be challenged once they have been reached.

¹²⁷ Network Notice paras 14-15 and Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities, Council document nr. 15435/02 ADD 1, para 19, available at http://ec.europa.eu/competition/ecn/joint_statement_en.pdf (last accessed 30.3.2012)

¹²⁸ This is also relevant for the discussion of *res judicata* in the proposal for the binding effect of NCA decisions on national courts throughout the EU, as explored in chapter 5.

¹²⁹ Cases 209/78 to 215/78 and 218/78 *Van Landuyck v Commission* [1980] ECR 3125

A further argument for the 'judicial' nature of NCA decisions can be derived from *Gabalfrisa*. An indicator of the binding nature of the decisions of the Tribunales was that its registrars were responsible for the *enforcement* of its decisions. Even if the European Commission initiated proceedings relieving an NCA of its competence, and its investigation subsequently led to a prohibition decision, the NCA would also be responsible for enforcement and monitoring compliance with the Commission's decision in the framework of its cooperation duties in the ECN.

A stronger reading, based on the Court's own language in *Syfait*, is that at their outset proceedings before NCAs are always *intended* to lead to a judicial decision.¹³⁰ The fact that a case may be terminated before reaching the final stage does not change the nature and objective of the proceedings.¹³¹ This interpretation, focusing on the beginning rather than the end of the procedure, would also get over the barrier posed by the Commission's theoretical possibility of relieving an NCA of its competence under Article 11(6). As Brammer points out, proceedings can also be terminated in the civil courts, for example by one of the parties withdrawing the action¹³² In that sense, those courts' proceedings would not lead to a judicial decision either and would also be barred from submitting preliminary references, which would be an illogical result.

Finally, if the CJEU wanted to exclude references from all NCAs it could do so explicitly. The CJEU's intention to allow some references from domestic competition authorities could be implied by its willingness to rehearse the arguments at the admissibility stage. The CJEU had previously given a ruling in response to a preliminary reference from a NCA in the *Spanish Banks* (1992) case. In that case admissibility was not an issue and its status as a court or tribunal was not raised at all.

From a legal perspective, it would therefore be possible to allow references from NCAs under the post-2004 regime. But what are the interests of NCAs, the Court, and the wider competition enforcement system?

¹³⁰ *Syfait* judgment at [28]

¹³¹ G Anagnostaras 'Preliminary Problems and Jurisdiction Uncertainties: the Admissibility of Questions Referred by Bodies Performing Quasi-Judicial Functions' (2005) 30(6) *European Law Review* 878-890, 890

¹³² S Brammer 'Co-operation Between National Competition Agencies in the Enforcement of EC Competition Law' (Hart, 2009) 97

5. Allowing NCAs access to the CJEU

5.1 The perspective of NCAs

The motivation of an NCA seeking a preliminary reference is interesting in the context of the ECN. It may be noteworthy that the HCC's reference was made in 2003, before the current enforcement regime came into force. We may not see another preliminary reference from an NCA for two reasons: because of the apparently negative message sent in *Syfait*, and because of closer cooperation with the Commission and other agencies within the ECN.

Nevertheless, the foundations of the ECN were already being built at that time, and there were informal links with the Commission¹³³. There are other possible reasons for a reference. The most obvious is the legal certainty in receiving a binding ruling from the ultimate interpreter of EU law. This suggests that less formal advice from the Commission would be less satisfactory from the perspective of the NCA. Art 11(5) Regulation 1/2003 provides that "the competition authorities of the Member States may consult the Commission on any case involving the application of Community law". While this legal provision suggests a formal consultation process, in practice advice has been given through more informal bilateral communication between competition officials in DG COMP and the NCA.¹³⁴ One reason for submitting a reference to the Court of Justice may be to circumvent the influence of the Commission and the NCAs duties as a member of the European Competition Network.¹³⁵

A further reason may be the *kudos* of making case law, which is tied to the status of the competition authority in its domestic environment, for example relative to its parent ministry, but more pertinently relative to the appeal courts. A ruling from the CJEU is likely to provide a safeguard against judicial review or appeal of the NCA's decision.

These parallel channels of supranational advice from the Commission and the CJEU have been used particularly by the Spanish courts, as explored in the following chapter. These parallel channels could give rise to interpretative pluralism where the opinions differ.

¹³³ H Kassim & K Wright 'Bringing Regulatory Processes Back In: The Reform of EU Antitrust and Merger Control' (2009) 32(4) *West European Politics* 738-755; interviews with national competition official 30.1.2008; H Kassim & K Wright 'Network Governance and the European Union: the Case of the European Competition Network', paper presented at the Institute of European Law Conference, 'After the First 50 Years: The Future of European Law and Policy', University of Birmingham, 2-4 July 2008

¹³⁴ Interviews on the functioning of the European Competition Network

¹³⁵ Komninos also makes this point: A Komninos 'Article 234 and National Competition Authorities in the Era of Decentralisation' (2004) 29(1) *European Competition Law Review* 106-114, 112

5.2 The perspective of the Court of Justice

5.2.1 Jurisdiction

Having explored the motivations of NCAs in seeking a reference, what are the incentives for the CJEU in accepting their requests? In deciding whether to accept preliminary references from bodies falling outside a narrow definition of 'court or tribunal', the Court is choosing between two competing imperatives. One is to extend its jurisdiction over a wider range of institutions at the national level. Substantively this would give it more opportunities to shape and clarify the content of (here, competition) law. This incentive resonates with the view that, as in other institutions, the Court of Justice and the judges and personnel within it are self-interested actors concerned with enhancing their own status and jurisdiction.¹³⁶

If the CJEU adopts a narrow definition of a court or tribunal, it constrains its own jurisdiction. Appraising the early cases in which the CJEU adopted a generous approach to the independence criterion, Tridimas asserts: "The overriding concern is to make the preliminary reference procedure available as widely as possible, thus ensuring the uniform interpretation of Community law and the availability of a remedy for the protection of Community rights. The Court, behaving, in effect as a rational decision-maker, *widens the franchise of Community law: by making the preliminary reference procedure available to as wide a category of bodies as possible, it upholds Community rights at the lower level and increases their immediacy and resonance.*"¹³⁷

5.2.2 Floodgates

However, this was before the 2004 enlargement, coinciding with the entry into force of the decentralisation reforms. The Court's second, competing, incentive is to control its own workload. The possibility of references from a significantly wider constituency of national authorities, many of which had no experience of applying EU law, brought implications for the Court's caseload. It seems likely that the Court was concerned about opening the floodgates to an abundance of quasi-judicial bodies more generally, not only NCAs, when it

¹³⁶ A-M Burley and W Mattli 'Europe Before the Court: A political Theory of Legal Integration' (1993) 47(1) *International Organization* 41-76, 60. This is countered by Karen Alter in 'Jurist Advocacy Movements in Europe: The Role of Euro-Law Associations in European Integration (1953-1975) in *The European Court's Political Power* (Oxford OUP 2009) 63-91, 64

¹³⁷ T Tridimas 'Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure' (2003) 40 *Common Market Law Review* 9-50, 30 (emphasis added)

formulated its strict definition in *Syfait*. Anagnostaras notes that *Syfait* departs from the “rather liberal way in which the criteria for determining the status of the referring authorities have been applied in the past possibly implying the intention to move towards more rigorous standards in the future”.¹³⁸

In arguing that preliminary references should be accepted from NCAs, Komninos does not properly address this floodgates argument, and Anagnostaras states that “judgment does not seem to have been influenced by effectiveness and practicality concerns”¹³⁹. However, *Syfait* was the first antitrust preliminary ruling case following the entry into force of the Modernisation Regulation.

Ehlermann & Atanasiu make a number of predictions about the possible effects of modernisation on the Court of Justice and its caseload.¹⁴⁰ One argument was that preliminary references from national courts would increase following decentralised enforcement of Article 101(3). Komninos also voiced this expectation.¹⁴¹ One reason could be a modest level of private enforcement. Nonetheless, at the time of the *Syfait* reference from the Hellenic Competition Commission, the judges of the Court of Justice may have been wary of opening the floodgates to references from national competition authorities, and non-judicial bodies more broadly in policy areas beyond competition, in addition to a possible increase in references from national courts traditionally defined.

The predicted increase does not appear to have materialised. In its 2009 report on the functioning of Regulation 1/2003,¹⁴² the Commission voiced concerns that national judges were applying Article 101(3) inconsistently. This suggests that judges did not feel the need to request a reference from the Court of Justice. If the forthcoming draft directive on damages actions is successful in its goal of increasing private enforcement, more references may be expected from national courts as they become involved in private enforcement, especially in Article 101(3) cases where they have jurisdiction for the first time. Many of these are general civil courts with little specific competition enforcement experience. Put in the context of the Commission’s parallel avenue for advice, the CJEU is

¹³⁸ G Anagnostaras ‘Preliminary Problems and Jurisdiction Uncertainties: the Admissibility of Questions Referred by Bodies Performing Quasi-Judicial Functions’ (2005) 30(6) *European Law Review* 878-890, 878

¹³⁹ G Anagnostaras ‘Preliminary Problems and Jurisdiction Uncertainties: the Admissibility of Questions Referred by Bodies Performing Quasi-Judicial Functions’ (2005) 30(6) *European Law Review* 878-890, 887

¹⁴⁰ I Atanasiu & C-D Ehlermann ‘The Modernisation of EC Antitrust Law: Consequences for the Future Role and Function of the EC Courts’ (2002) 23(2) *European Competition Law Review* 72-80

¹⁴¹ A Komninos ‘Article 234 and National Competition Authorities in the Era of Decentralisation’ (2004) 29(1) *European Competition Law Review* 106-114, 106

¹⁴² Communication from the Commission to the European Parliament and the Council: Report on the functioning of Regulation 1/2003, COM (2009) 206 final

constrained by the wider impact on EU law as a whole, whereas the Commission tool of *amicus curiae* and opinions is a competition-specific *sui generis* instrument.

5.2.3 Consistency

Advocate General Jacobs was in favour of allowing NCAs references “to provide some additional safeguard of the uniformity of Community law”.¹⁴³ This would minimise institutional divergence described in the first part of this chapter. The additional safeguard is particularly important given that NCAs have a duty to disapply national law which is incompatible with EU competition law, according to *Consorzio Fiammiferi*.¹⁴⁴ “That possibility might ...commend a generous approach towards references from such authorities, so as to ensure that any uncertainties as to the applicable Community rules are clarified before national legislation is disapplied.”¹⁴⁵

Preliminary references from NCAs would iron out uncertainty, inconsistencies and potential divergence early in the case. These are arguments also used in the Commission staff working paper on *amicus curiae* briefs and the subsequently drafted provisions on requesting guidance from the Commission.¹⁴⁶

A preliminary reference would strengthen the ECN more than the Commission relieving an NCA of its jurisdiction. Even though the Commission will not do this without consulting an NCA, ‘seizing’ the case could be perceived negatively and antagonistically, whereas a preliminary reference is more cooperative and a positive action in building the law. A further point is the relative precedent value, and attendant benefits of consistent application of EU law, of a Commission decision and a preliminary ruling from the Court. There are however levels below the Art 11(6) procedure more commonly used to ensure consistency, such as notifying other members after opening proceedings under Art 11(3), and of an envisaged decision under Art 11(4). This argument is further strengthened by the fact that Article 11(6) has never been activated so far.

¹⁴³ A-G Jacobs’ Opinion at [45]

¹⁴⁴ A Kaczorowska ‘The Power of a National Competition Authority to Disapply National Law Incompatible with EC Law – and its Practical Consequences’ (2004) 25(9) *European Competition Law Review* 591-599, 598; Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629; Case C-198/01 *Consorzio Industrie Fiammiferi v Autorita Garante della Concorrenza e del Mercato* [2003] ECR I-8055

¹⁴⁵ A-G Jacobs’ Opinion at [45]

¹⁴⁶ Commission staff working paper: Reform of Regulation 17 – The proposal for a new implementing regulation – Article 15(3) submissions as *amicus curiae*, SEC (2001) 1827 Brussels, 13.11.2001

5.2.4 Judicial economy

One argument for allowing references from NCAs, is judicial economy – it may be desirable to allow questions from NCAs to deal with divergences, inconsistencies and problematic application of the rules as early as possible in a case, which may in turn reduce the need for judicial review whereupon the review court may in turn refer a question to the CJEU.¹⁴⁷

This reasoning was previously supported by the Court in *De Coster*. The CJEU did not take up AG Ruiz Jarabo Colomer's proposed test to limit preliminary references because "if the CJEU were to decline jurisdiction, the referring court would have to resolve the issue of Community law itself and there is no guarantee that the opportunity for making a reference would arise at a subsequent stage".¹⁴⁸ It could even be a more efficient use of resources, although this is a weaker argument given the amount of time a preliminary ruling takes, and the interruption of the national proceedings.

The *inter partes*/adversarial procedure requirement may also be understood as an aspect of judicial economy, and the timing of a preliminary reference, rather than purely an element in the definition of a court or tribunal. Judicial economy dictates that all issues should be raised as early as possible in the proceedings. In the interests of justice" a question should be referred for preliminary ruling only after both sides have been heard, as the CJEU itself states in its information note on references from national courts.¹⁴⁹

These practical considerations add weight to the Advocate General's decision to admit the referral. A similar argument was used to admit a preliminary reference from an apparently non-judicial authority in the *Broekmeulen* case¹⁵⁰ – but in that case there was no right of judicial review and the issues could not be raised later.

Advocate General Jacobs links judicial economy with the expertise of competition authorities in *Syfait*: "It is at least arguable that a specialised competition authority having judicial characteristics might be better placed to identify the relevant issues of Community

¹⁴⁷ Komninos (writing before the *Syfait* judgment and before Regulation 1/2003 came into force and the significant 2004 EU enlargement) and Gerber and Cassinis advocate allowing preliminary references from NCAs so the CJEU may intervene at an earlier point.

¹⁴⁸ *Syfait* judgment at [32]

¹⁴⁹ Information Note on references from national courts for a preliminary ruling 2011 C 160/01 [19]; Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629; C-277, 318 & 319/91 *Ligur Carni* [1993] ECR I-6621

¹⁵⁰ C-246/80 *Broekmeulen v Huisarts Registratie Commissie* [1981] ECR 2311. Professional body of Dutch doctors against whose decisions there was no right of judicial review.

competition law than a generalist court charged with reviewing the decisions of the former body at a subsequent stage”¹⁵¹

5.2.5 Expertise

The use of the Article 267 procedure by a quasi-judicial agency allows the participation of domestic authorities with essentially administrative characteristics in a dialogue that the law intended clearly to take place exclusively between judges.¹⁵² In the *Syfait* case, the Advocate General’s starting point was to examine how many members of the Competition Commission were required to have legal training, noting that only two out of nine members were required to be trained lawyers. However, he acknowledged that in competition law enforcement there is also the need for economic and commercial expertise. An argument used in the previous case law (*De Coster*) for not allowing a reference if the referring body could not be characterised as purely judicial was that an *administrative agency would not have adequate knowledge and expertise to frame the question in the right way*. This is not an argument that holds true with national competition authorities as the primary public enforcers of competition law.

In *De Coster*¹⁵³, one of the arguments proposed for not admitting the reference was that authorities which are not strictly judicial are not properly qualified to understand complex legal problems and frame relevant questions for the purposes of the reference. The Advocate General criticised “the unsettling effect of the intervention of an administrative body in a dialogue between courts”.¹⁵⁴ “Article [267] introduces an instrument for judicial cooperation, a technical dialogue by courts and between courts.”¹⁵⁵ Previously references were allowed from non-judicial bodies to cement a unified system of law, but it is no longer needed as Community law is an “accepted reality”.¹⁵⁶ EU law appears to have become a victim of its own success. This is the other side to the judicial economy argument: if the first instance body has already submitted a preliminary reference, a review court would be reluctant to send another one. Hence “the connection between the CJEU and national courts is seriously hindered by an administrative body...well-intentioned but lacking in independence...[hold]ing up the whole procedure.”¹⁵⁷ The

¹⁵¹ A-G Jacobs’ Opinion at [45]

¹⁵² A-G Colomer in *De Coster* at [79]

¹⁵³ *De Coster v Collège des Bourgmestre et Echevins de Watermael-Boitsfort* (C-17/00) [2001] ECR I-9445

¹⁵⁴ At [75] et seq

¹⁵⁵ At [76]

¹⁵⁶ At [75]

¹⁵⁷ A-G Colomer in *De Coster* at [79]

Advocate General wants to guard the judicial role. AG Colomer returned to his theme more recently in *Alpe Adria Energia*: Art 267 was drafted to “strengthen the institutional voice of an authority of the Member States: the judiciary”.¹⁵⁸ He criticised the fact that although the reference was declared inadmissible in *Syfait*, “there is no indication ...that the Court acted in the interests of the *institutional balance required by Article [267 TFEU]*”¹⁵⁹ (emphasis added). Ironically, the deficient expertise argument has been levelled at national judges in civil courts when they are required to engage with economic analysis, unfavourably compared to the technical knowledge of national competition authorities.

One of the limitations of preliminary rulings, as noted by Atanasiu and Ehlermann, is that they only give answers on the interpretation of the law, which are often very abstract, leaving concrete application to the national judge.¹⁶⁰ This is compounded by limited pre-reform precedents on the application of Art 101(3) from the Commission. They argue that the ‘advisory’ nature of the instrument makes it “insufficient to guarantee the consistent application of Article [101].” It is interesting that Atanasiu and Ehlermann do not seem to consider preliminary rulings to be sufficiently specific, or even sufficiently binding. This can be compared with the Commission’s non-binding opinions to national courts, which can encompass factual and economic, as well as legal, matters. Nevertheless, resolution on the facts of the individual case is still down to the national judge.

5.2.6 Future preliminary references to the General Court?

As a response to the floodgates argument, the potential future jurisdiction of the General Court in preliminary rulings would give scope to broaden the court or tribunal definition again. Art 225(3) Treaty of Nice, activated by decision of the Council of Ministers, allows for the Court of First Instance (now General Court) to hear preliminary references in specific EU policy areas including competition, where it already has a wealth of experience

¹⁵⁸ C-205/08 *Alpe Adria Energia* [2009] ECR I-11525 AG Colomer returning to his *De Coster* arguments at [29]. See also [3], [24]-[53] in particular: “It is unnecessary to emphasise the strategic role of the national courts in the enforcement of Community law. By drafting Article [267 TFEU] and keeping it unaltered for more than half a century, the founding fathers of the European Union and their successors were committed to strengthening the institutional voice of an authority of the Member States: the judiciary. That is not an innocent choice, as history demonstrates. The European Union has been described as an integration of law, through the law, attesting to the crucial role of the courts at European Union constitutional level. The reference for a preliminary ruling is procedural confirmation of that truism. Given that it embodies an authority founded on independence, on its relationship with the law and on the resolution of disputes, the judiciary has a singular voice which is isolated from the political sphere and linked only to the will of the law.”

¹⁵⁹ *Alpe Adria Energia* at [33]

¹⁶⁰ I Atanasiu & C-D Ehlermann ‘The Modernisation of EC Antitrust Law: Consequences for the Future Role and Function of the EC Courts’ (2002) 23(2) *European Competition Law Review* 72-80, 76

in appeal cases and individual/undertaking cases against the European Commission. As former General Court President Vesterdorf has stated, the General Court is a de facto specialist tribunal.¹⁶¹ Atanasiu and Ehlermann also advocate giving the General Court preliminary ruling jurisdiction in cases concerning Article 101 and 102, but claim that specialised chambers are not necessary given the existing competition expertise in the General Court.¹⁶²

The Advocate General in *De Coster* posited the Treaty of Nice provision as a strong argument for a clearer definition, in order to give guidelines to the General Court, otherwise "the hesitancy of the first body will be matched by that of the second."¹⁶³

It is somewhat paradoxical that while DG COMP has faced renewed criticism concerning the sustainability of its current structure,¹⁶⁴ there is a concurrent trend towards national competition regimes emulating that structure. This due process criticism and the coming into force of Lisbon treaty and the Charter on Fundamental Rights makes an eventual third level competition tribunal more likely. In light of *Menarini* this could mean full review of Commission decisions, including an ability to revisit the facts, as a second level of adjudication. More relevant for the purposes of this chapter, a preliminary reference function for that tribunal, or for the General Court.

Lenaerts asserts that preliminary ruling is an "indivisible jurisdiction"¹⁶⁵ and that "the key to [its] success has lain in the centralisation of the interpretative function, which promotes uniformity. If other bodies are invited to participate there is a risk that the unity will be destroyed". This centralisation of interpretation is arguably threatened in the context of the Commission's own 'preliminary reference procedure' through Article 15 Reg 1/2003 as explored in the following chapter.

¹⁶¹ B Vesterdorf, 'Judicial Review in EC Competition Law: Reflections on the Role of the Community Courts in the EC System of Competition Law Enforcement' (2005) 1(2) *Competition Policy International* 3-27, 15-16.

¹⁶² I Atanasiu & C-D Ehlermann 'The Modernisation of EC Antitrust Law: Consequences for the Future Role and Function of the EC Courts' (2002) 23(2) *European Competition Law Review* 72-80, 79-80

¹⁶³ AG Opinion in *De Coster* at [70]

¹⁶⁴ See e.g. I Forrester 'Due Process in EC Competition Cases: A Distinguished Institution with Flawed Procedures' (2009) 34(6) *European Law Review* 817-843; Editorial comments 'Towards a More Judicial Approach? EU Antitrust Fines under the Scrutiny of Fundamental Rights' (2011) 48(5) *Common Market Law Review* 1405-1416; Contra e.g. E Gippini Fournier 'The Elusive Standard of Proof in EU Competition Cases' in C-D Ehlermann & M Marquis (eds) *European Competition Law Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart, 2011) 295-318

¹⁶⁵ K Lenaerts 'The Unity Of European Law And The Overload Of The ECJ – The System Of Preliminary Rulings Revisited' in I Pernice, J Kokott & C Saunders (eds) *The Future of the European Judicial System in a Comparative Perspective* (Nomos, 2006) , 230-231 Proceedings of the European Constitutional Law Network conference, Berlin 2005: http://www.ecln.net/elements/conferences/book_berlin/lenaerts.pdf (accessed 19.1.2007)

At the same conference, Baudenbacher suggested that the 2004 competition reform would result in a “major shift from the direct action to the preliminary reference procedure”.¹⁶⁶ This means a weakening of the CJEU’s/General Court’s judicial review in public enforcement, because before, it would have been reviewing the Commission, and only courts not parties have a say in preliminary references. The General Court has a high degree of specialist knowledge, which could assist national courts. The character of the preliminary reference procedure could change in the General Court as safeguarding legal unity would be its secondary task. According to Baudenbacher, instead it would resolve the case with a “strong focus on the protection of individuals, and on competition as a system. This may lead to greater generosity in defining whether an entity constitutes a court entitled to make a reference, by including, for instance, arbitration tribunals.” Arbitral tribunals not only fall outside the Court’s preliminary reference procedure, but also outside the remit of Regulation 1/2003 and the European Competition Network. Although there has been a proposal for the European Commission to act as ‘amicus curiae’ to arbitral tribunals¹⁶⁷ in an analogous way to the mechanism in Article 15, as explored in the next chapter.

6. Parallel proceedings and asymmetric channels

Komninos argues that, legally speaking, once the competence of the national authority ceases by the Commission taking over the case, the Court of Justice would no longer have jurisdiction to deliver a preliminary ruling. The reference would be devoid of purpose, and no longer directed towards settling a legal dispute.¹⁶⁸ In this way, the Commission would indirectly deprive the Court of Justice of its jurisdiction. The contrasting argument is that politically and practically, the Commission would be highly unlikely to take the Article 11(6) course of action if the Court had received a preliminary reference and had yet to rule on it.¹⁶⁹ Anagnostaras’s further interpretation is that “there is no longer jurisdiction to answer preliminary questions already referred for a ruling *after* parallel proceedings have

¹⁶⁶ C Baudenbacher ‘Concentration of Preliminary References at the ECJ or Transfer to the High Court/CFI: Some Remarks on Competition Law’ (2005) in I Pernice, J Kokott & C Saunders (eds) *The Future of the European Judicial System in a Comparative Perspective* (Nomos, 2006)

¹⁶⁷ C Nisser & G Blanke ‘ICC Draft Best Practice Note on the European Commission Acting as *Amicus Curiae* in International Arbitration Proceedings – An Explanatory Note’ (2008) 19(1) *European Business Law Review* 193–197 and ‘ICC Draft Best Practice Note on the European Commission Acting as *Amicus Curiae* in International Arbitration Proceedings – The Text’ (2008) 19(1) *European Business Law Review* 198–218

¹⁶⁸ See e.g. Case 138/80 *Borker v Conseil de l’Ordre des Avocats à la Cour de Paris* [1980] ECR 1975

¹⁶⁹ A Komninos ‘Article 234 EC and National Competition Authorities in the Era of Decentralisation’ (2004) 29(1) *European Law Review* 106–114, 112

been instituted at Community level, i.e. by the Commission.” In effect this contributes to the ‘hierarchy’ of the Commission over the Court.

However, as already asserted, the Commission cannot legally force the prosecuting body of an NCA to drop its investigation, or its judicial authority to withdraw a preliminary reference.

If we accept that the Court’s arguments on the operation of Art 11(6) Reg 1/2003 were flawed, *Syfait* does not constitute a total bar to all NCAs. However, at best, the outcome of *Syfait* amounts to discrimination towards Member States whose competition regime is organised along single institutional lines, as opposed to those with structurally separate administrative and adjudicative bodies, as they do not have the same opportunities to seek guidance from the CJEU. There is a bias in favour of dualist national competition regimes of types B and C. This has implications for the uniform application of law. For example, contrast the inadmissibility of the HCC (type A) in *Syfait* with the acceptability of the reference from the Swedish Market Court (type C) in the *Kanal 5 and TV 4* case.¹⁷⁰

More practically the message in *Syfait* is likely to deter NCAs from submitting a preliminary reference in the first place. By emphasising in its judgment that NCAs are required to work in close cooperation with the Commission (*Syfait* at [34]), the CJEU effectively passes over responsibility to the Commission for how NCAs should interpret and apply competition law.

Maher and Stefan do see a silver lining in the judgment.¹⁷¹ A benefit of the judgment is clearer jurisdictional relationships – the Commission and NCAs; and the Court of Justice and national courts. However, this is a trade-off between legal certainty - knowing the narrow definition of court for Art 267 purposes - and uniform application – the same system for all competition enforcement agents. Most importantly, in practice the jurisdictional relationships are not so clearly defined if one also takes into account the other communication channels in the EU competition enforcement framework. The Commission is not leaving national courts to communicate with the CJEU, but is cultivating its own interaction with them, as shown in the following chapter. There are *asymmetric* dual channels interpreting EU law.

¹⁷⁰ C-52/07 *Kanal 5 Ltd and TV 4 AB v Föreningen Svenska Tonsättares Internationella Musikbyrå (STIM) upa* [2008] ECR I-9275 on copyright management by collecting societies

¹⁷¹ I Maher & O Ştefan ‘Competition Law in Europe: The Challenge of a Network Constitution’ in D Oliver, T Prosser & R Rawlings (eds) *The Regulatory State: Constitutional Implications* (OUP, 2010), 178-199, 193

7. Conclusions

This chapter has considered the diagonal relationship between the Court of Justice of the European Union and national competition authorities. It considered the context of the post-2004 system, in particular multiple enforcers in both public and private enforcement; the challenge of consistent application of antitrust rules in decentralised enforcement; and the quasi-judicial nature of competition enforcement undertaken by these multiple enforcers. Under Article 35 Regulation 1/2003, Member States can decide the appropriate institutional structures for public enforcement of competition law. The chapter explored Member States' institutional choices and the consequences of being designated a court or an agency with respect to obligations under Reg 1/2003.

Then the discussion turned from the designation of courts or administrative agencies as competition authorities at the national level, to the criteria in the EU's autonomous definition of a 'court or tribunal' for the purposes of the preliminary reference procedure. These criteria are important for determining which national bodies have access to the CJEU's advice and interpretation of the law. Of particular relevance are the need for the referring body to have an *inter partes* procedure i.e. to be a third party adjudicator between the parties, to be independent, and to have compulsory jurisdiction leading to a decision of a judicial nature.

The chapter analysed the *Syfait* case in which the Hellenic Competition Commission, as a competition authority with integrated investigative and adjudicative functions, addressed a reference to the CJEU but was ultimately refused. The analysis focused on the CJEU's interpretation of the independence criterion and on the Court's reasoning that the Commission can always potentially take a case away from the NCA under Article 11(6) Regulation 1/2003, so that its proceedings may not lead to a final decision of judicial decision. In practice this could bar references from all NCAs since they are all subject to Art 11(6) within the European Competition Network. The chapter argued that Art 11(6) should not bar NCAs, since their proceedings are always *initially* intended to lead to a final decision of a judicial nature. The Commission has never activated Art 11(6). In addition, according to Art 35(4) Regulation 1/2003, the effects of Art 11(6) only extend to the prosecuting authority. However, even if legally we can argue for the Court accepting preliminary references from NCAs, the message sent in *Syfait* has effectively frozen them and the Court has curtailed its own jurisdiction.

There is certainly a bias towards dualist NCAs i.e. those which separate their investigative and decision-making functions. Integrated monist NCAs have an extra hurdle to overcome because they do not have the structural separation of functions required to meet the independence requirement. As a result they do not have the same opportunity to seek guidance from the CJEU.

It is understandable that the Court uses the definition of a court of tribunal as an instrument for controlling its own workload. If the General Court, or a dedicated competition tribunal, is eventually granted jurisdiction to hear preliminary references, this may be an opportunity for loosening the admissibility requirements. While this may lead to a more coherent system for competition law, there are implications for the wider coherence of EU law as a whole. This raises the broader question of whether the CJEU's preliminary ruling jurisdiction is divisible.

In refusing to allow the participation of domestic authorities with essentially administrative characteristics in a dialogue that the law intended clearly to take place exclusively between judges (*De Coster*), the Court is restricting its own influence in the interpretation of EU competition law. While the CJEU preserves its dialogue with courts, it excludes NCAs with integrated functions. Responsibility for interpretation falls to the Commission in the context of the European Competition Network. Meanwhile, the European Commission is extending its sphere of influence by strengthening its links with national courts. This includes intervening in national court proceedings to elucidate its interpretation of the law, as seen in the following chapter.

CHAPTER 4: EUROPEAN COMMISSION INTERVENTION IN NATIONAL COURT PROCEEDINGS¹

1. Introduction

The previous chapter explored the diagonal relationship between the Court of Justice of the European Union and administrative authorities designated as national competition authorities. It found that the Court of Justice limits its own jurisdiction and influence in the interpretation of EU competition law by excluding national competition authorities from access to the preliminary reference procedure. In its *Syfait* judgment on the admissibility of the Hellenic Competition Commission's reference, the Court effectively handed over responsibility for interpretation of the law to the European Commission in the context of the European Competition Network. In this way the CJEU preserves the preliminary reference procedure as a dialogue between courts, notwithstanding the quasi-judicial functions of national competition authorities.

This chapter now contrasts that diagonal relationship with the one between the European Commission, as administrative supranational authority with quasi-judicial functions, and national courts. While the CJEU has restricted its own jurisdiction, meanwhile since the 2004 reforms the European Commission has extended its sphere of influence by strengthening its links with national courts. This includes intervening in national court proceedings to elucidate its interpretation of the law. As such, there are asymmetric dual channels for opinions on the interpretation of EU law. The Commission is not leaving national courts to communicate with the CJEU, but is cultivating its own interaction with them, as shown in this chapter.

Previously, the Court of Justice's general preliminary reference procedure was the only formal mechanism to address potential divergent application of EU law among the national courts of the Member States. This chapter addresses how the European

¹ A version of this chapter was published as K Wright 'The European Commission's Own 'Preliminary Reference Procedure' in Competition Cases?' (2010) 16(6) *European Law Journal* 736-759. An earlier version of the ideas and the case table appeared in K Wright 'European Commission Opinions to National Courts in Antitrust Cases: Consistent Application and the Judicial-Administrative Relationship' (2008) ESRC Centre for Competition Policy working paper 08-24. A more detailed version of the section on admissibility of European Commission interventions in national court proceedings was published as K Wright 'European Commission Interventions as Amicus Curiae in National Competition Cases: the Preliminary Reference in *X BV*' (2009) 30(7) *European Competition Law Review* 309-313. Between the submission of the thesis and the viva voce examination two further cases of Art 15(3) interventions came to light: 161/2012 *Tessenderlo Chemie v Belgische Staat* in the Belgian Constitutional Court on 20.12.2012 on tax deductibility of fines, with similar issues and outcome to the *X BV* case, and a Slovak case concerning a fine for abuse of a dominant position in the Supreme Court (see ECN Brief 05/2012, pp. 56-57).

Commission has added to this general institutional link through the specific *amicus curiae* instrument of opinions and own-initiative interventions to national courts in competition cases, under Art 15 Reg 1/2003. Given that national civil courts are not involved in the European Competition Network (except where designated competition authorities for the purposes of public enforcement), Art 15 is designed as a tool to minimise divergent application of the competition rules following decentralisation of enforcement. Under Article 15(1), EU Member State courts may ask the European Commission for its opinion on questions relating to the application of the EU antitrust rules. This could therefore be described as the European Commission's own 'preliminary reference procedure'. There are dual channels for advice for national courts in competition law cases – through the Commission, and through the CJEU.²

Under Article 15(3), the European Commission and national competition authorities may also make own-initiative written interventions, and oral submissions with the permission of the judge, in legal proceedings between private parties. Art 15(3) allows the European Commission to intervene on issues relating to Articles 101 or 102 TFEU "where the coherent application of Article [101] or [102 TFEU] so requires".³ In this second case, the Commission's clear purpose is to influence judicial proceedings, whether at the request of the court or not.⁴ This situation calls into question the institutional balance at the supranational level in terms of the respective roles of the Commission and the Court of Justice, and diagonally in terms of the effect on national judicial autonomy.

The Commission's advice is formally non-binding. In a number of cases, the Commission draws attention to its own soft law instruments such as notices and guidelines. The Commission's authorship of soft law instruments at the legislative level suggests its primacy over interpretation of those instruments at the enforcement level, and could lend weight to its intervention. The opinion itself is a soft law instrument. Drawing from Senden's⁵ categorisation of such instruments, the Commission's opinion performs a 'post-law' function, interpreting and elucidating existing law. However, the Commission's

² Even in *C-234/89 Delimitis v Henninger Bräu* [1991] ECR I-935 the CJEU had stated that "on the one hand" a court could request a preliminary ruling" and "on the other" could contact the Commission. (Summary judgment at [5])

³ Under the same provision national competition authorities may also intervene in their own Member State courts "on issues relating to the application of Article [101] or [102 TFEU]".

⁴ At the supranational level, Harlow asserts that the Commission appearing as *amicus curiae* to the CJEU in preliminary reference proceedings is "a strategy designed to enhance its position next to the Court". C Harlow 'Three Phases in the Evolution of EU Administrative Law' in P Craig & G de Burca (eds) *The Evolution of EU law*, 2nd edn (OUP, 2011) 439-464, 449

⁵ L Senden, 'Soft Law and its Implications for Institutional Balance in the EC' (2005) 1(2) *Utrecht Law Review* 79-99, 82

opinion can also become binding through the national court's judgment if the national judge in effect transposes the Commission's advice.

The attitude and receptiveness of the judge is another important factor in the impact of the Commission's opinion. Clearly the judge is likely to be more receptive where s/he has requested the opinion, compared to when the Commission intervenes at its own initiative. Therefore this chapter seeks to investigate the incidence of the Commission's interventions, and, where possible, the impact on national judicial decision-making, against this theoretical background and in practice. It sets out a detailed presentation of the practice that is emerging in the post-2004 regime by seeking to trace all the cases in which the European Commission has provided observations, either at the request of the national judge or at the Commission's own initiative. This information is currently incomplete and scattered across a number of sources. This chapter's contribution is therefore to present a more coherent and up-to-date account of the practice emerging under Art 15, as well as placing it within the wider theoretical context. This should make the Commission's interventions more transparent. Transparency is desirable for legitimacy, legal certainty, and if Commission opinions are to have the most impact for promoting convergent application of EU antitrust rules among national judges.

The mechanism of Art 15 is also a concrete test of the operation of interpretative pluralism introduced in Chapter 2. The Commission's legal advice to courts is stated to be "without prejudice to the interpretation of the Court of Justice", which is the ultimate interpreter of EU law. The two supranational institutions interpret the same body of (EU) law. However, there is room for the Commission to give its own interpretation of the CJEU's case law as well as its own soft law instruments. To what extent does the Commission challenge, or complement, the role of the Court of Justice?

1.1 Outline of the chapter

The chapter is structured as follows. First it sets the context of the broader relationship between the European Commission and national judges in EU competition law, before describing the relevant provisions of Regulation 1/2003 and its accompanying Notice on cooperation between the Commission and national courts (the Courts Notice).⁶ Secondly it introduces Art 15 Reg 1/2003 as a tool for consistent application of the competition

⁶ Commission Notice of 27 April 2004 on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, OJ C 101, 27.4.2004, 54-64 ('Courts Notice')

rules following decentralised enforcement. This draws on original research on the pre-legislative history on Art 15. The third section investigates the legal nature of the Commission opinion as an EU instrument, drawing on the soft law literature. Having explored this theoretical context, the fourth section looks at how Art 15 works in practice. Using DG Competition and national competition authority Annual Reports and DG Competition and national court databases, I seek to identify and trace the decisions in which the Commission has delivered opinions (Art 15(1)). In each case I aim to discover in what circumstances national judges use this tool; what questions were asked of the Commission; the content and nature of the Commission's advice, for example purely factual, economic or legal; and the impact of the Commission's opinion on the judge – how closely s/he follows it. This will feed into a discussion on the relationship with and implications for the judicial preliminary reference procedure.

I then investigate cases where the Commission has intervened at its own initiative as *amicus curiae* under Art 15(3), its reasons for doing so, and how the national court dealt with the Commission's observations. The case of X BV warrants particular attention, in which a national court requested a preliminary ruling from the CJEU questioning the admissibility of the Commission's Art 15(3) intervention. The CJEU's response gives the Commission scope to intervene in a national court case related to the effective application of Articles 101 and 102 TFEU, even if the court is not directly applying them. It therefore affects traditional notions of judicial independence and procedural autonomy (both stated as rationales for the impossibility of a network of national courts). First, the case suggests an emphasis on *effective* – not only coherent – application of the Community rules, over judicial independence. Second, it implies that a Commission intervention could extend to national cases concerning, for example, contract disputes, follow-on damages actions, or criminal proceedings – intervention not initially intended by Regulation 1/2003.

I find 23 opinions under Art 15(1) and 9 interventions under Art 15(3), with varying degrees of success in identifying the parties and how the opinion was dealt with by the national court.

2. Relationship between the European Commission and national judges in the application of EU antitrust rules

Regulation 1/2003 decentralised the enforcement of EU antitrust rules as laid down in Articles 101 and 102 TFEU. National courts and competition authorities can directly apply

these provisions, including the possibility to assess whether conduct falls under the exempting conditions of Article 101(3), previously within the exclusive jurisdiction of the European Commission. The absence of a network with formal rules for judicial cooperation⁷ emphasises the importance of the provisions in the Courts Notice and of the existing case law of the Union Courts.

Following the general principle of primacy of Union law famously established in the *Costa v ENEL* case⁸, in the competition policy field *Walt Wilhelm*⁹ confirmed the precedence of European competition law where there was a conflict with national competition law. It required a national authority to take “proper account” of a Commission decision or to take “appropriate measures” while the Commission’s investigation was still in progress. This obligation was strengthened in later case law, as outlined below. *BRT v SABAM*¹⁰ established the direct applicability of Article 101 TFEU (and 102 TFEU by analogy) in individual cases, implying that they confer rights on individuals which national courts must protect. The CJEU reaffirmed this more recently and concretely in *Courage v Crehan*¹¹, by recognising the right to damages to compensate loss as a result of breach of the Union competition rules. From a procedural perspective, *Van Schijndel* concerns when national courts should raise points of their own motion which have not been raised by the parties to the case. If domestic law confers on national courts a discretion to apply of their own motion binding rules of law, they must also apply the EU competition rules, even when the party with an interest in application of those provisions has not relied on them. However, “Union law does not require national courts to raise of their own motion an issue concerning the breach of provisions of Union law where examination of that issue would oblige them to abandon the passive role assigned to them by going beyond the ambit of the dispute defined by the parties themselves.”¹²

In the interests of consistent enforcement of EU competition law throughout the Union, and of the effective protection of Union rights, Article 3 of Regulation 1/2003 encapsulates a convergence rule, meaning that national competition rules may not lead to a different

⁷ There are fora such as the Association of European Competition Law Judges and the European Judicial Training Network. The Commission provides funding for training judges in developments in EU competition law and assessing economic evidence – see <http://ec.europa.eu/competition/court/training.html> (accessed 3.8.2010).

⁸ Case 6/64 *Costa v Enel* [1964] ECR 585

⁹ Case C-14/68 *Walt Wilhelm v Bundeskartellamt* [1969] ECR 1

¹⁰ Case C-127/73 *Belgische Radio en Televisie and Société Belges des Auteurs, Compositeurs et Editeurs de Musique v SV SABAM and NV Fonior* [1974] ECR 51

¹¹ Case C-453/99 *Courage Ltd v Crehan* [2001] ECR I-6297. Since Regulation 1.2003 came into force, the CJEU followed up in joined Cases C-295/04-C-298/04 *Manfredi and Others v Lloyd Adriatico Assicurazioni SpA and Others* [2006] ECR I-6619

¹² Courts Notice, [3] citing joined cases C-430/93 & C-431/93 *Van Schijndel* [1995] ECR I-4705, at 13-15, 22

outcome than that of EU competition law where there is an effect on trade between Member States. It also builds on the principle of parallel application already established in *Walt Wilhelm*. Where a national court applies national competition laws to practices within the meaning of Article 101 and 102 which may affect trade between Member States, it must also apply Article 101 and 102. If an agreement, decision or practice is not prohibited under Article 101, the court cannot apply stricter national rules to prohibit it (but it may apply stricter rules than Article 102 on unilateral conduct), and it may not allow a practice which is prohibited by Article 101 or 102. In this way Reg 1/2003 partly codifies existing case law.

Delimitis had ruled that “conflicting decisions [by national courts against those envisaged by the Commission] would be contrary to the general principle of legal certainty and must, therefore, be avoided.”¹³ In line with that ruling and with *Masterfoods*,¹⁴ Article 16(1) Reg 1/2003 states that in situations of consecutive application of the competition rules by codifying that where national courts rule on agreements, decisions or practices under Article 101 or 102 of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to that adopted decision.¹⁵ In cases of concurrent application, that is, if the Commission is contemplating a decision and a national court is also dealing with the matter, the national court must ‘avoid’ adopting a decision that would conflict with the Commission’s.¹⁶ NCAs have a lesser obligation, as they are only bound by existing, not envisaged decisions (Article 16(2)), likely because they are subject to closer coordination with the Commission through the European Competition Network.

According to Advocate General Cosmas in *Masterfoods*, there is no risk of conflict where the proceedings dealt with by the Commission and the national court are not ‘completely identical.’¹⁷ Following the CJEU’s *Courage v Crehan* judgment mentioned above, Crehan asserted his right to damages in the English courts. In *Inntrepreneur v Crehan*,¹⁸ the House of Lords interpreted the Advocate General’s *Masterfoods* statement as meaning that there

¹³ Case C-234/89 *Delimitis v Henninger Bräu* [1991] ECR I-935 [47]

¹⁴ Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369 [60]

¹⁵ The original proposal said “Member States shall use *every effort* to avoid any decision that conflicts with decisions adopted by the Commission.” (emphasis added). In the drafting negotiations, one Member State requested the insertion of ‘insofar as the facts of the case are the same’ – see Council document 5158/01 of 11 January 2001, interinstitutional file 2000/0243 (CNS): Note from the General Secretariat of the Council of Ministers to national delegations.

¹⁶ See A Komninos, ‘Effect of Commission Decisions on Private Antitrust Litigation: Setting the Story Straight’ (2007) 44 *Common Market Law Review* 1387-1428 for discussion of the impact of a Commission decision on national proceedings in various scenarios.

¹⁷ Opinion of Advocate General Cosmas delivered on 16 May 2000 in *Masterfoods*, at [16]

¹⁸ *Inntrepreneur Pub Company and Others v Crehan* [2006] UKHL 38

was a requirement to accept the factual basis of a decision reached by a Union institution only when the *specific* agreement, decision or practice before the national court has also been the subject of a Commission decision, involving the *same parties*.¹⁹ In *Crehan*, Lord Hoffman suggested that ‘the decision of the Commission is *simply evidence* properly admissible before the English court which, given the expertise of the Commission, may well be regarded by that court as highly persuasive.’²⁰ (emphasis added). This could be read as the highest national court’s reluctance to defer to an administrative agency. On the other hand, the expertise of the Commission was noted. Lord Hoffman, rebuffing the Court of Appeal’s reasoning, explicitly stated that ‘deference’ was not an appropriate concept for a court exercising concurrent jurisdiction with the Commission in the post-2004 system.

There are also conflicting attitudes in other Member States.²¹ In *Rutamur*,²² the Madrid Audiencia Provincial (appeal court) ruled that the criteria laid down by DG COMP for determining agency agreements were not binding on national courts in civil disputes. Similarly, nor were the determinations of the Tribunal de Defensa de la Competencia (part of the Spanish NCA) as it is not a real Tribunal, but a mere administrative body.²³ Conversely in another case, a first instance court referred to and followed *Masterfoods*, and even referred to a Commission opinion given in a different case.²⁴ As will be seen

¹⁹ That case concerned the Commission’s finding of fact (foreclosed market) in previous decisions involving beer ties in the same market. According to Art 288 TFEU “A decision which specifies those to whom it is addressed shall be binding only on them.” One of the difficulties with the *Inntrepreneur v Crehan* case was precisely that the Commission had never taken a final decision on whether or not *Crehan*’s specific agreement infringed Article [101(1)]. Once the European Commission noted that *Crehan*’s damages claim was pending in the English courts, it suspended its concurrent investigation and in effect referred the case to the domestic courts. There was no Community interest in the Commission continuing its proceedings, and as such the national judge was in fact respecting the Commission by making his own ruling on the matter. Additionally, the House of Lords judgment determined that there was no obligation to stay the proceedings or adopt interim measures, for example suspending national proceedings to seek a preliminary reference from the European Court of Justice – it was only “well advised” – Advocate General Van Gerven in *C-128/92 H J Banks & Co Ltd v British Coal Corporation* [1994] ECR I-1209, at [61].

²⁰ *Inntrepreneur v Crehan* at [69]

²¹ E.g. Case 1235/2004 *L'Andana y Estaciones de Servicio L'Andana v REPSOL*, Spanish Supreme Court, 23.12.2004, reported in H Brokelmann ‘Enforcement of Articles 81 and 82 EC under Regulation 1/2003: The Case of Spain and Portugal’ (2006) 29(4) *World Competition* 535-554, 552

²² Judgment No. 368/05 of 5 July 2005 handed down by Audiencia Provincial of Madrid Section 21°. *Rutamur SA/Repsol Comercial de Productos Petrolíferos SA*

²³ P Ibáñez Colomo ‘A Spanish Court considers a distribution contract to be a “genuine” agency agreement therefore not caught by Art. 81.1 EC (*Rutamur / Repsol*)’ 5.7.2005, e-Competitions, N°326, www.concurrences.com. See also H Brokelmann ‘Enforcement of Articles 81 and 82 EC under Regulation 1/2003: The Case of Spain and Portugal’ (2006) 29(4) *World Competition* 535-554, 552: “Some courts even expressly declare that they are not bound by precedents of the [Tribunal de Defensa de la Competencia] or the Commission...arguing that these are mere administrative bodies whose decisions are subject to judicial review. Others declare that they are not bound by judgments of courts of other branches that their civil branch and not even by rulings of the ECJ...”

²⁴ Judgment No. 14/05 of 22 March 2005 handed down by Juzgado de lo Mercantil No. 2 of Madrid *Gebe/ BP Oil España*, reported in P Ibáñez Colomo, ‘A Spanish Tribunal finds that a distribution agreement may not be a 'genuine' agency agreement and thus may fall within the scope of Art. 81.1 EC (*Gebe / BP Oil España*)’, 22 March 2005, e-Competitions, N°23, www.concurrences.com

below, there have been a number of requests for an opinion from Spain on nullity of agreements between service stations and their oil company suppliers. There may be so many requests because of the uncertainty or disagreements about the precise obligation to follow Commission findings or decisions.²⁵

In the Treaty, the only direct institutional link between the national courts and the European institutions is their relationship with the Court of Justice of the European Union through the preliminary reference procedure under Article 267 TFEU, where a court asks for a ruling on the interpretation of the Treaty or other legislative acts. The Commission, historically the primary enforcer of competition law in the EU, has therefore attempted to complement the formal judicial link of the preliminary reference procedure with a parallel strengthening of its own relations with the national courts.²⁶ These cooperation instruments are based on the principle of loyal cooperation between the European institutions and the Member States in achieving the objectives of the Treaty, deriving from Article 10 EC (now Article 4(3) TEU) and giving rise to an obligation of mutual assistance. This is acknowledged in paragraph 15 of the Courts Notice: ‘...Article 10 EC ... implies that the Commission must assist national courts when they apply Community law [*Delimitis*]. Equally, national courts may be obliged to assist the Commission in the fulfilment of its tasks [*Roquette Freres*].’ *Delimitis* had already recognised the Commission’s duty to loyally cooperate with Member States under Article 10 EC by providing requested “economic and legal” information to them, in a forerunner to Art 15(1) Reg 1/2003.²⁸

3. Article 15 of Regulation 1/2003 as a tool for consistent application of the rules

Under Regulation 1/2003, the Commission may become involved in a national court case in a number of ways: by transmitting information; by giving an opinion (both under Article 15(1)); or by submitting written or oral observations at its own initiative (15(3)). The possibility of asking for a Commission opinion had been included in the superseded 1993

²⁵ C-344/98 *Masterfoods Ltd (t/a Mars Ireland) v HB Ice Cream Ltd* [2000] ECR I-11369 [60] – discussed in greater length in chapter 5

²⁶ Recital 21 of Regulation 1/2003 recognises that: “Consistency in the application of the competition rules ...requires that arrangements be established for cooperation between the courts of the Member States and the Commission. This is relevant for all courts of the Member States that apply Articles [101] and [102] of the Treaty, whether applying these rules in lawsuits between private parties, acting as public enforcers or as review courts...”

²⁷ Case C-94/00 *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes* [2002] ECR 9011 [31]

²⁸ *Delimitis* [53]; see also Case C-2/88 *Zwartveld* [1990] ECR I-3365, [18]

Courts Notice, where it was characterised as an ‘interim opinion’ giving ‘useful guidance’.²⁹ The own-initiative intervention, which the commission calls an ‘amicus curiae’ intervention, is a novel development.

Article 15(1) provides that ‘In proceedings for the application of Article 101 or Article 102 of the Treaty, courts of the Member States may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of the Community competition rules.’ Paragraphs 27-30 of the current Courts Notice elaborate on the principles and procedure to be followed. In the spirit of the independence of the courts, the Commission should not consider the merits of case before the national court. It should assist the court in a neutral manner - it is not involved in the *inter partes* element of the case and may not consult the parties before formulating its opinion.³⁰ In apparently safeguarding the independence of the Court by not hearing the parties, this may leave the national court’s decision, or the Commission opinion itself, open to challenge. This is relevant at two stages: first, when the judge decides whether to request an opinion and how that request is drafted, and secondly, after the national judge receives the Commission’s intervention. As the process may not be in front of the parties, the national court may rely on the Commission’s opinion without cross-examination. As such, the rights of the defendant to a fair trial could be unduly restricted.³¹ A judge might consider the Commission’s opinion in chambers rather than in open court. The parties may not have an opportunity to challenge the facts which the national court presents to the Commission in its request or the circumstances upon which the Commission bases its opinion. Whether this would raise concerns for the parties’ rights would depend upon how the Commission’s opinion is dealt with in the national proceedings, that is how much weight the national judge accords to it, and whether there are sufficient procedural safeguards. Given that the Regulation does not provide for a procedural framework, courts must deal with the Commission's opinion in accordance with the relevant national procedural rules, while respecting the general principles of Union law, in particular the principles of effectiveness and equivalence, invoked in paragraph 35 of the Courts notice. Applying the principle of equivalence, in Member States where the parties have rights to be heard on the interventions of NCAs, they should also have the right to respond to

²⁹ Commission Notice of 13 February 1993 on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EC Treaty, OJ C 39, 6.

³⁰ If the Commission has been “contacted by any of the parties in the case pending before the court on issues which are raised before the national court, it will inform the national court thereof, independent of whether these contacts took place before or after the national court’s request for cooperation.” Courts Notice [19]

³¹ B Francis, ‘Subsidiarity and Antitrust: the Enforcement of European Competition Law in the National Courts of Member States’, (1995) 27 *Law and Policy of International Business* 247-276, 272. Although this article relates to the superseded 1993 Courts Notice, the author’s observation still holds.

submissions of the Commission.³² For example, in France where a court requests an opinion from the Competition Authority it may only give that opinion after hearing the parties (Article L462-3 *Code du Commerce*). Similarly in the Netherlands, the parties have a right to respond to submissions of competition authorities.

Closely linked is the question of the opinion's evidentiary status in the relevant national procedural law. It has been suggested that under some Member States' procedural law it could be deemed hearsay or inadmissible opinion.³³ Alternatively, it could have the status of expert evidence subject to cross-examination by the parties. *Van der Wal* states that where the Commission '...acts as a legal or economic adviser to the national court ... documents drafted in the exercise of that function must be subject to national procedural rules in the same way as any other expert report.'³⁴

In terms of procedure, the opinion is drafted by the European Competition Network unit, A-4, in the Directorate-General for Competition (DG COMP) unless a related investigation is on-going elsewhere, when it will be referred to the relevant department. The unit formally consults the European Commission Legal Service before giving the opinion.³⁵ The Courts Notice sets the Commission a target deadline of four months in which to provide the opinion. For transparency, the Commission stated that it intended to post its opinions on DG COMP's website once it had received a copy of the final national court judgment in the case as required under Article 15(2) of Regulation 1/2003, as long as there was no legal impediment presented by national procedural rules.³⁶ However, to date it has posted only five opinions – three to the Brussels Court of Appeal, one to the Swedish Supreme

³² National positions are available in the ECN convergence survey as at 14 April 2008: 'ECN Working Group on Cooperation Issues - Results of the questionnaire on the reform of Member States' national competition laws after EC Regulation No. 1/2003.' In response to question 13 – 'Does (or will) your national law include provisions to facilitate the use of Art 15.3?' - five Member States (Belgium, Bulgaria, Italy, Malta, Luxembourg) stated they were not intending to voluntarily introduce national law to facilitate *amicus curiae* interventions by NCAs and the Commission. Amendments were under consideration in Portugal and Slovenia, and the others had provisions through intervention of the NCA. In some cases, present rules were deemed sufficient (eg Austria), in Cyprus the Supreme Court would issue a Procedural Order, in the Czech Republic there were no specific rules but *amicus* interventions were possible according to the code of civil procedure. Denmark, Finland and Spain confirmed that there was no specific rule on the operation of Article 15(3), but there was no legal obstacle to its application.

³³ B Francis, 'Subsidiarity and Antitrust: the Enforcement of European Competition Law in the National Courts of Member States', (1995) 27 *Law and Policy of International Business* 247-276, 272

³⁴ Joined cases C-174/98P & C89/98P *Van der Wal and the Netherlands v Commission* [2000] ECRI-1, at [45]

³⁵ Interview with a DG COMP official on the European Competition Network, 13.7.2006, Brussels

³⁶ European Commission Annual Report on Competition Policy 2005, SEC(2006)761 final, 15.6.2006, 74, para 221. Available at http://ec.europa.eu/competition/publications/annual_report/2005/en.pdf (accessed 2.8.2010)

Court and one to the Supreme Administrative Court of Lithuania.³⁷ These and other cases in which opinions were issued are considered in more detail below.

To facilitate the monitoring of the application of EU antitrust rules throughout the Community, Article 15(2) requires Member States to forward to the Commission a copy of any written judgment of national Courts deciding on the application of Articles 101 or 102 TFEU, “without delay” after the decision has been communicated to the parties.³⁸ It should be noted that the obligation falls on the Member State to transmit a copy of a judgment to the Commission, rather than on the court giving judgment.³⁹ In practice it is usually the NCA that informs the Commission of a case, although this is a matter for national law and procedure.⁴⁰ In the UK, transmission of judgments is provided for in the Civil Procedures Rules EU Competition Law Practice Direction (2004), point 6. Point 5.2 places a duty on the parties to proceedings and the UK competition authorities to notify the court at any stage of the proceedings if they are aware that the European Commission has adopted or is contemplating a decision in relation to the proceedings and which would have legal effects.⁴¹ In other Member States, the national provisions have also undergone reform clarifying the legal channel for communication of court judgments.⁴²

It should also be noted that the obligation to notify does not extend to decisions by national courts *not* to apply Articles 101 and 102 after deliberation, or failing to consider

³⁷ Opinion of the European Commission to Lietuvos vyriausiasis administracinis teismas, administrative case number A502-337/2008 *UAB Schneidersöhne Baltija/UAB Libra Vitalis* of 9.9.2008; Opinion of the European Commission to the Högsta domstolen, case number T 2808-05 *Danska Staten genom BornholmsTrafiken vYstad Hamn Logistik Aktiebolag*; Avis de la Commission européenne suite à la demande de la Cour d’appel de Bruxelles dans l’affaire 2004-MR-6 *Laurent Emond contre Brasserie Haacht*; Avis de la Commission européenne suite à la demande de la Cour d’appel de Bruxelles dans l’affaire 2004-MR-7 *SABAM contre « Productions et Marketing »*; Avis de la Commission européenne suite à la demande de la Cour d’appel de Bruxelles dans l’affaire 2004-MR-8 *Wallonie Expo SA/FEBIAC asbl*, D000554, 2.2.2005, available at http://ec.europa.eu/competition/court/antitrust_requests.html (last accessed 7.9.2012)

³⁸ See national court judgments database at <http://ec.europa.eu/comm/competition/elojade/antitrust/nationalcourts/index.cfm> (accessed 2.8.2010)

³⁹ Such an obligation on courts was mooted in the drafting of Regulation 1/2003 – see Council document 5158/01 of 11 January 2001, interinstitutional file 2000/0243 (CNS): Note from the General Secretariat of the Council of Ministers to national delegations.

⁴⁰ This channel of communication was partly modelled on the German system, section 90 of the Act Against Restraints on Competition (ARC), with the important difference that the ARC imposes a duty on the national court hearing a case between private parties which impacts on competition to inform the Federal Cartel Office. Section 90a ARC (7th amendment 2005) incorporates the provisions of Article 15 Regulation 1/2003 itself into the German law.

⁴¹ Practice Direction available at http://www.justice.gov.uk/civil/procrules_fin/contents/practice_directions/competitionlaw_pd.htm (accessed 2.8.2010)

⁴² Supplement to European Commission Annual Report on Competition Policy 2005: Application of the EC competition rules by national courts, 100. Available at http://ec.europa.eu/competition/publications/annual_report/2005/report_supplement_20061113.pdf (accessed 2.8.2010)

the possibility of effect on trade between Member States altogether and only applying national competition rules.

The national judge should ascertain whether the Commission has initiated a procedure in an investigation involving the same parties or whether it has already taken a decision, to conform with its obligation not to adopt a decision counter to one of the Commission. In practice, this may involve the NCA in that Member State. In addition, there may be follow-on cases for damages in national courts resulting from the finding of an infringement at EU level. To account for this, Article 15(1) also allows for national courts to request documents or information held by the Commission on a case. The indicative deadline for transmission of information is one month, shorter than the four months foreseen for an opinion. Any exchange of information is subject to professional secrecy safeguards under Article 339 TFEU and Article 28 Regulation 1/2003. The national court must guarantee the protection of confidential information – if it is not able to make this guarantee, the Commission is not obliged to hand over information or documents: see *Postbank*,⁴³ which affirmed that cooperation between the Commission and Member States courts must not undermine EU guarantees of the protection of business secrets.

For the purposes of the trade-off between effective enforcement of EU competition law and judicial autonomy, the novel development of Article 15(3), elaborated by paragraphs 32-35 of the Courts Notice, is more interesting. That provision allows the Commission the possibility of making submissions *on its own initiative* in cases in national courts either orally or in writing “where the coherent application of Article [101 or 102] of the Treaty so requires.” An NCA may also submit observations before its national courts “on issues relating to the application of Article [101 or 102 TFEU]”. The Commission is free to submit a written amicus brief to the national court, but it is at the judge’s discretion to admit oral submissions in the proceedings. By the same token, an NCA may submit observations before its national courts. There is a duty for intervention to be facilitated by national rules: Courts notice point 34: “Since the regulation does not provide for a procedural framework within which the observations are to be submitted, Member States’ procedural rules and practices determine the relevant procedural framework. Where a Member State has not yet established the relevant procedural framework, the national court has to determine which procedural rules are appropriate for the submission of observations in the case pending before it.” However, the Regulation does not prescribe the precise rules by which Member States should implement Article 15. In some Member States, the *amicus curiae* concept is not known at all.

⁴³ Case T-353/94 *Postbank v Commission* [1996] ECR II-921

In the interests of consistent application of the competition rules and to avoid conflicting opinions in the same case, the Courts Notice states that the Commission and a national competition authority should inform each other when either submits observations in the form of an *amicus curiae* brief to a national court. Although there is no specific measure for this, presumably it would be done through the ECN. Again, there is no notification obligation on the national court itself.

I did original research into the pre-legislative history of Article 15 to discover the motivation for including the *amicus curiae* provision. The Commission staff working paper on *amicus curiae* briefs⁴⁴ characterises private parties as “private enforcers of the public interest” when they bring a claim before a national court under Articles 101 and 102. The Commission intends making submissions in a limited number of cases, and it envisages NCAs, which are closer to the national courts and often also closer to the facts of the case, taking a leading role in submissions to courts.⁴⁵ The staff working paper notes that co-ordination or avoidance of conflicting decisions is much better achieved through the ECN (in which national court cases would only become indirectly involved through NCAs). In the negotiations on the drafting of Article 15 of the Regulation, some Member States had proposed that their national competition authorities act as intermediaries between the courts and the Commission.⁴⁶ However, the Commission foresees intervening with *amicus* briefs “where the proper interpretation of Commission notices or guidelines is in dispute or where the Commission brings in information on similar issues being dealt with by itself or by Member States”.⁴⁷

In the staff working paper, *amicus curiae* briefs are explicitly stated to be a complement to preliminary references under Article 267 TFEU, as a means of alerting national judges to decisions in other Member State courts or to deal with new points of law.⁴⁸ The Commission views *amicus curiae* submissions as a means of safeguarding the public interest. Presumably it would become aware of a case either through the ECN – an

⁴⁴ Commission Staff Working Paper: Reform of Regulation 17 – The proposal for a new implementing regulation – Article 15(3) submissions as *amicus curiae*, SEC (2001) 1827, 13.11.2001 (submitted to the Council working group)

⁴⁵ *ibid*, [8]

⁴⁶ Document: 5158/01 Secretariat to delegations, 11 January 2001 (for: Germany, Denmark, Luxembourg, Austria, Sweden – but Denmark requests that in normal circumstances NCAs should represent the Commission in national court proceedings. Conversely Germany requests that NCAs submit observations independently and not as the representative of the Commission. Document: 8383/1/02 [Spanish] Presidency to COREPER, 27 May 2002: France requests that the Commission be authorised to make written observations to the national court only via the national competition authority.

⁴⁷ Commission Staff Working Paper: Reform of Regulation 17 – The proposal for a new implementing regulation – Article 15(3) submissions as *amicus curiae*, SEC (2001) 1827, 13.11.2001, 4, fn 4

⁴⁸ *ibid*, [10]

example of the NCA being closer to the facts, as mentioned above - or where the Member State has submitted a copy of the first instance decision to it, as required to do under Article 15(2) of Regulation 1/2003. Unlike national competition authority envisaged decisions, national court judgments do not have to be notified by the Member State until after they are handed down. The Commission has stated that it would tend to make *amicus* submissions at appeal stage,⁴⁹ where the impact on consistency is likely to be the greatest.

Under 15(3), while it is at a court's discretion to request an opinion from the Commission or to permit oral submissions in a case, the court should accept written submissions as *amicus curiae* from the Commission or from its national competition authority. Nevertheless, the national judge alone, subject to the constraints of national procedural law, may decide how much weight to give to that submission as, like a Commission opinion, it is not formally binding. Under Art 15(1), since the national court initiates the request, on the face of it there is little concern about judicial autonomy. However, if the judge basically transposes the Commission's opinion, the Commission may indirectly influence the case.⁵⁰

The next section examines the legal nature and possible legal effects of Commission opinions more generally.

4. Legal nature of the Commission opinion as an EU instrument

In general EU law, there was wide discretion for the Commission to issue opinions and recommendations under Article 211(2) EC: 'In order to ensure the proper functioning and development of the common market, the Commission shall...formulate recommendations or deliver opinions on matters dealt with in this Treaty, if it expressly so provides *or if the Commission considers it necessary.*' (emphasis added) There is no equivalent measure in the Lisbon Treaty. Article 288 TFEU lays down the hierarchy of legislative acts, and states that recommendations and opinions shall have no binding force. In principle, it is therefore up to Member State courts to decide whether to take account of them in interpreting Community and related national legislation. However, the CJEU's judgment in *Grimaldi* goes further, at least in its treatment of recommendations: "Recommendations

⁴⁹ *ibid.*, [22]

⁵⁰ See e.g. Comments of A Winckler in C-D Ehlermann & I Atanasiu (eds) *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law*, European University Institute (Hart, 2003), 18: "French judges, for example, tend to take on board the Commission's advice as if it were the very word of law."

are not intended to produce binding effects, and therefore they cannot create rights upon which individuals may rely before a national court. However, the national courts are *bound to take them into consideration* in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions.”⁵¹ (emphasis added)

The CJEU therefore recognises that while an instrument may not have binding force, it may still have legal significance. In this context, ‘binding Community provisions’ would clearly include Articles 101 and 102 of the Treaty, and the provisions of Regulation 1/2003. Whereas the Commission had non-specific, implicit powers to issue opinions under Art 211 EC (now repealed) “whenever necessary”, it has been granted explicit powers to deliver opinions through Regulation 1/2003. But what is the status of those opinions?

From a purely textual approach there is an argument that the binding force of opinions is analogous to that of recommendations, as they are mentioned in the same clause of Article 288 TFEU. However, they have been distinguished based on their origin, addressee, and content. Whereas recommendations are made on the institutions’ own initiative, opinions are usually adopted in response to another party’s initiative - as in Article 15(1), at the request of the court.⁵² However, the national court does not have a specific right to a reply, and the Commission has a certain discretion over the information or advice it imparts – governed by *First and Franex*: “if a national court needs information that *only* the Commission can provide, the principle of loyal cooperation...will, in principle, require the Commission...to provide that information as soon as possible, unless refusal to provide such information is justified by overriding reasons relating to the need to avoid any interference with the functioning and independence of the Community or to safeguard its interests.”⁵³ (emphasis added) In terms of content, “recommendations are invitations to take certain measures, sometimes accompanied by additional provisions of a procedural nature,” whereas opinions are “expressions of opinion from the Commission or the Council on a certain factual or legal situation.”⁵⁴ Unlike a recommendation, an opinion does not function as an alternative to legislation,⁵⁵ but tends to apply to a specific case.

⁵¹ Case C-322/88 *Grimaldi v Fonds des Maladies Professionnelles* [1989] ECR 4407, at [19]

⁵² B Beutler and R Bieber, *Die Europäische Union: Rechtsordnung und Politik* (Nomos, 1993) 192-3, 199, cited in L Senden, *Soft Law in European Community Law* (Hart, 2004), 161

⁵³ Case C-275/00 *European Community v First NV and Franex NV* [2002] ECR I-10943, at [49]

⁵⁴ H Smit and P Herzog, *The Law of the European Community: A Commentary on the EEC Treaty*, Volume 5, (Matthew Bender & Co, 2002), 629, cited in Senden (2004) 161-162

⁵⁵ Senden (2004), 161-162

If opinions have no binding force, but nevertheless courts are required to take them into consideration, they can be characterised as soft law instruments. Soft law is defined as “rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects.”⁵⁶ Senden contends that individual soft law acts may be capable of having “incidental” binding force, by virtue of another decision or instrument.⁵⁷ As mentioned above, the Courts notice (paragraph 27) states that Commission opinions can be sought where Regulations, decisions, notices, and guidelines (the latter two themselves soft law instruments) do *not* offer sufficient guidance. In this way, any soft binding force is not necessarily dependent on one of these Community instruments. For example, the advice may become binding through the national judgment by virtue of the way in which the national judge uses it for interpretation of other obligations or instruments. Snyder also suggests that a soft law act could become binding if one of the parties in private litigation invokes it.⁵⁸ In practice, as discussed below, in a number of opinions the Commission has indicated its existing notices and guidelines, previous decisional practice, and CJEU case law. In those cases, it appears not to be *establishing* ‘rules of conduct’ in a constitutive way but *clarifying* and summarising them in a declaratory manner.

As Bast notes, “non-binding instruments do not have obligatory force, although they can indirectly possess such a force in conjunction with other legal norms, in particular the principle of the protection of legitimate expectations.”⁵⁹ Parties to the dispute before the court that has received a Commission opinion may have legitimate expectations concerning the content of the opinion. Although the Commission is in principle not to go into the merits of the case, it gives strong indications of the factors to be considered and the decisional precedents to be applied - including soft law instruments like notices and guidelines, which could themselves become binding through the national court’s judgment.

The question arises whether opinions to national courts under Regulation 1/2003 are really opinions as understood by Article 288 TFEU. Beyond its notice on cooperation with

⁵⁶ L Senden, *Soft Law in European Community Law* (Hart, 2004), 112, developed from F Snyder, ‘The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques’ (1993) 56(1) *Modern Law Review* 19-54, 32: “rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects.”

⁵⁷ Senden (2004), 236

⁵⁸ Snyder (1993), 33

⁵⁹ J Bast, ‘Legal Instruments’, in A. Von Bogdandy and J. Bast, (eds), *Principles of European Constitutional Law* (Hart, 2006), 373-418, 409

national courts in the State aid field,⁶⁰ there appears to be no other policy area where the Commission offers an opinion in national judicial proceedings. The opinion to a national court appears to be a *sui generis* instrument. The only other circumstances in which opinions are used by the Commission as a Community legal instrument are before adoption of national legislation; as a reasoned opinion on own or third party initiative, usually to Member States before infringement proceedings under Article 258 TFEU; and for internal purposes in the legislative decision-making process, especially under the co-decision procedure.⁶¹

To my knowledge, none of the opinions to national courts identified below have been published in the Official Journal, as EU instruments are required to be under the Rules of the Procedure of the Commission.⁶² This shows a lack of transparency, and contrasts with the availability of the preliminary rulings of the Court of Justice. If opinions are capable of influencing the outcome of cases in national courts, there is an argument for closer scrutiny. Scott notes that “...existing case law operates to successfully guard against the danger that the Commission might seek to smuggle in new legal obligations [in post-legislative guidance] by disguising them in non-binding form.”⁶³ The test for whether an act is challengeable in EU law is that it has binding legal effects regardless of form,⁶⁴ bringing about a distinct change in applicant’s legal position.⁶⁵ As the Commission opinion in this context is explicitly stated to be non-binding, it might be hard to show that an opinion itself had such binding effects separate from the national court judgment. The fact that DG COMP formally consults the Commission Legal Service before giving its opinion does however imply its sensitivity to the possibility of legal consequences arising.

⁶⁰ Commission Notice on the enforcement of State aid law by national courts, OJ C 85, 9.4.2009, (especially Part 3), superseding Commission Notice on cooperation between national courts and the Commission in the State Aid field, O J C 312, 23.11.1995, 8.

⁶¹ L Senden, *Soft Law in European Community Law* (Hart, 2004), 186-7; Craig and de Burca also discuss Commission opinions only in relation to comitology procedures, and to Member State infringement proceedings: P Craig and G de Burca, *EU Law: Text, Cases and Materials* (OUP, 3rd edn, 2002) 397 *et seq*

⁶² Rules of Procedure of the Commission, C (2000) 3614, OJ 2000 L 308, 8.12.2000, 26, as amended. Articles 17 [Secretary General] and 18 [Authentication of Commission instruments]: The Secretary General must ensure that all Community instruments mentioned in Article 249 EC [now 288 TFEU] are notified to those concerned and published in the Official Journal.

⁶³ J Scott ‘In Legal Limbo: Post-Legislative Guidance as a Challenge for European Administrative Law’ (2011) 48(2) *Common Market Law Review* 329-355, 344

⁶⁴ 22/70 *Commission v Council (ERTA)* [1971] ECR 263; T-3/93 *Air France v Commission* [1994] ECR II-323

⁶⁵ 60/81 *IBM v Commission* [1981] ECR 2639

If we categorise EU soft law instruments according to their function - preparatory and informative; interpretative and decisional; and steering instruments⁶⁶ - Commission opinions fit most comfortably into the second category. As Senden notes, the Commission adopts interpretative notices and communications of general application giving the Commission's opinion on how EU law should be interpreted, often summarising the European courts' case law. In this way, they have a 'post-law' function.⁶⁷ Commission opinions do not correspond easily with the definition of a soft law instrument establishing rules of conduct in Snyder's and Senden's formulations. In addition, they apply in specific judicial proceedings.

This interpretative or decisional instrument is an important instance of the concurrent powers of the Commission and the Court of Justice. Senden characterises as "concurrent powers" arising outside the area of decision-making, the Commission's power to adopt interpretative instruments and the CJEU's power to interpret Union law.⁶⁸ This implies that the Commission should communicate the CJEU's case law, somehow without giving its own interpretation of it. Snyder remarks that the combination of Article 211 EC (the power to issue recommendations and opinions) and the duty of loyal cooperation under Article 10 EC (now 4(3) TEU) gives the Commission "both the *power and the duty* to *explain* ECJ judgments and spell out their implications for national governments and private parties."⁶⁹ (emphasis added).

The use of soft law can affect the institutional balance in the Union. Art 19 TEU⁷⁰ (ex Art 220 EC) suggests that the Court of Justice has a monopoly over interpretation of Union law- or at least the 'final say' as ultimate arbiter. But the authoring of soft law rules and their day-to-day application is carried out by the Commission. The Commission's

⁶⁶ L Senden, 'Soft Law and its Implications for Institutional Balance in the EC' (2005) 1(2) *Utrecht Law Review* 79-99, 81

⁶⁷ L Senden, 'Soft Law and its Implications for Institutional Balance in the EC' (2005) 1(2) *Utrecht Law Review* 79-99, 82. Joanne Scott also adopts Senden's terminology in J Scott 'In Legal Limbo: Post-Legislative Guidance as a Challenge for European Administrative Law' (2011) 48(2) *Common Market Law Review* 329-355, 329. She separates 'interpretative' and 'decisional' instruments: "Whereas the former merely interpret EU law, the latter are said to indicate the manner in which an EU institution intends to exercise its discretion... Post-legislative guidance of this kind may be thought of as instruments of 'hybridity' within the language of 'new governance' scholarship in that they represent soft law elaborations of hard law norms." In fact in her case study (on climate change), Scott considers decisional guidelines, rather than guidance in an interpretative instrument which may be presented on a case by case basis.

⁶⁸ Senden (2005), 93

⁶⁹ F Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' (1993) 56(1) *Modern Law Review* 19-54, 33

⁷⁰ '1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.' (Although only 'the Treaties' are mentioned, it is assumed that all law should follow the Treaties.)

authorship of soft law instruments at the legislative level suggests its interpretative supremacy at the enforcement level.⁷¹ Where there is a clash between a soft law instrument and existing case law, the former would be in breach.⁷² The Commission is careful to stipulate that its opinions are given without prejudice to the interpretation of the CJEU through the possibility or obligation of the court to have recourse to the preliminary reference procedure. However, in applying and enforcing the law the Commission may add its own – subjective – views on how a particular case law or Treaty or secondary law provision should be understood,⁷³ or extending its scope. In those circumstances, I submit that it would overstep the boundaries of its powers and circumvent the role of the CJEU.⁷⁴

Despite the varying degrees of persuasive force of Commission instruments and guidance, if its opinions are sought in a greater number of cases, it is possible that precedents will accumulate, creating a body of soft law. Aside from the normative questions, the practical impact may depend on the extent to which such opinions only summarise existing law, or become more novel and interventionist. As noted above, Commission opinions could become binding indirectly through the national court's judgment, particularly if it essentially transposes the Commission's advice. The judgment would be effective between the parties, but a universal binding effect could result if a principle expressed in a Commission opinion is treated as a precedent in the national case law. There is already evidence for this in the Spanish case law (Gebe Oil, mentioned above).

The opinion referred to in Article 15(1) Regulation 1/2003 is dependent on a request from a national judge. However, the *amicus curiae* intervention envisaged in Article 15(3) is at the Commission's own initiative. The arguments for how Commission opinions may become binding hold equally for *amicus curiae* interventions. But here, the judge may be a

⁷¹ Broberg and Fenger also suggest that in policy areas where the Commission can issue binding decisions, such as in competition and State aid, the Commission “arguably both can and should assist the national court.” M Broberg & N Fenger Preliminary References to the European Court of Justice (OUP, 2010) 20

⁷² O Ştefan ‘European Competition Soft Law in European Courts: A Matter of Hard Principles?’ (2008) 14(3) European Law Journal 753-772, 764

⁷³ L Senden, ‘Soft Law and its Implications for Institutional Balance in the EC’ (2005) 1(2) *Utrecht Law Review* 79-99, 93

⁷⁴ Broberg and Fenger make a similar point: “...for the Commission to provide the national court with a form of assistance that the Treaty has placed in the hands of the Court of Justice could constitute a ‘*détournement de procédure*’.” M Broberg & N Fenger Preliminary References to the European Court of Justice (OUP, 2010), 21. Scott also points out several reasons to be concerned with this kind of interpretative or decisional guidance: “guidance may be treated as authoritative by the Member States. It may influence their attitude and behaviour, generating significant practical effects.” (p. 344) and it excludes courts “from being able to evaluate and shape the processes leading to the adoption of guidance of this kind.” (p. 346) J Scott ‘In Legal Limbo: Post-Legislative Guidance as a Challenge for European Administrative Law’ (2011) 48(2) *Common Market Law Review* 329-355

less willing recipient of the Commission's advice. The clear purpose is to influence judicial proceedings by lodging observations, whether at the request of the court or not. In the United States literature on impact of amicus curiae briefs in the US Supreme Court, Kearney and Merrill discuss three models of judging: ⁷⁵ the legal model, where judges seek to resolve cases in accordance with requirements of law - *amicus curiae* briefs would therefore be assumed to have an impact insofar as they add new information not brought by the parties; the attitudinal model, where judges have fixed ideological preferences, case outcomes are the sum of these preferences, and legal norms simply rationalise those outcomes after the fact - amicus briefs are therefore expected to have no impact; and the interest group model, where judges are 'empty vessels', deciding cases so as to reach results supported by the most influential groups in society. They find greatest support for the 'legal' model, also finding that briefs filed by institutional litigants were most successful in influencing the outcome of cases. In the EU, the impact is likely to depend on different judicial preferences in the Member States. The closest comparator would be the attitudes of judges to preliminary rulings, but more research would need to be carried out.⁷⁶

5. Article 15 in practice

5.1 Cases in which the Commission's opinion was sought: Art 15(1) Reg 1/2003

Ideally, cases in which the Commission has given opinions need to be considered in the context of the larger set of judgments in which national courts have applied EU competition rules (either in private enforcement, or in a review function). It is difficult to get an accurate EU-wide picture of all these cases. The most obvious source is DG COMP's national court cases database, given the obligation on the Member States to notify all such cases under Art 15(2). To date, since 1 May 2004 Regulation 1/2003 came into force, the Commission has included 335 national court judgments in its database⁷⁷. The majority of those judgments arose from private enforcement cases, primarily seeking annulment of

⁷⁵ J Kearney and T Merrill, 'Influence of *Amicus Curiae* Briefs on the Supreme Court' (1999-2000) 148 *University of Pennsylvania Law Review* 743-856. There are of course limitations in applying these findings to the EU. Many EU Member States' judicial systems are inquisitorial rather than adversarial, and in the US *amici* may act rather as interested advocates for the parties than friends of the court. According to Kearney & Merrill, amicus briefs are used in the vast majority, around 85%, of the US Supreme Court's argued cases. It should also be noted that this literature considers the effects on the Supreme Court rather than lower courts.

⁷⁶ B Rodger (ed) *Article 234 and Competition Law: An Analysis* (Kluwer, 2008) concerning preliminary references in competition cases before the reforms came into force on 1 May 2004.

⁷⁷ National court judgments database <http://ec.europa.eu/competition/elojade/antitrust/nationalcourts/> (last accessed 7.9.2012). Spain has the highest number of reported cases, numbering 101.

obligations under an agreement or contract on the grounds of incompatibility with Articles 101. A number of the judgments were judicial reviews of administrative decisions. In terms of subject matter, car sales and distribution, retail sale of automotive fuel, beer distribution, telecommunications, energy, and construction sectors feature frequently.

However, the Commission's five-year report on the functioning of Regulation 1/2003 acknowledges that Art 15(2) is not working sufficiently effectively.⁷⁸ It is highly likely that there are hidden cases in Member State jurisdictions which have not yet been notified to the Commission or where the database has not been updated. There are some inconsistencies between the database and the Commission's Annual Reports on Competition Policy. There may be a number of reasons for this. In some instances proceedings were on-going by appeal in a higher court. In theory the Commission should be notified of all first instance judgments, but this may not have happened. In other cases the court was involved in a public enforcement capacity. For example, in Sweden the competition authority is not competent to make a decision on fines, and must refer to the Marknadsdomstolen (Market Court). In some countries there is greater enforcement through the national competition authority rather than the courts. Taken at face value, the figures in the database show no cases at all applying EC antitrust rules in ten of the Member States.⁷⁹

As far as Commission opinions are concerned, according to a member of the Commission's Legal Service writing in a personal capacity, up to the middle of 2008 19 opinions had been requested from national courts and the Commission had delivered in all of them.⁸⁰ The Commission's 2009 communication to the Council and European Parliament on the

⁷⁸ Communication from the Commission to the European Parliament and the Council: Report on the functioning of Regulation 1/2003, COM (2009) 206 final, and accompanying Commission staff working paper SEC(2009)574, Brussels 29.4.2009, 79

⁷⁹ Bulgaria, Cyprus, Czech Republic (although there have been a number of cases – see e.g. Case No. 62 Ca 4/2007-115, *Tupperware*, Brno Regional Court, 1.11.2007), Estonia, Greece, Luxembourg, Malta, Romania, Slovakia, Slovenia.

⁸⁰ E. Gippini Fournier, 'Institutional Report: The Modernisation of European Competition Law: First Experiences with Regulation 1/2003', in H.F. Koeck and M.M. Karollus (eds), *The Modernisation of European Competition Law: Initial Experiences with Regulation 1/2003*, FIDE XXIII Congress Linz 2008 (Nomos, 2008) 375-483, 467. Subsequently, the European Commission Annual Report on Competition Policy 2009, COM (2010) 282 final, 117-119, reports that in 2009 the Commission issued five opinions - one to a Belgian court, one to a Lithuanian court, and three to Spanish courts. The 2010 annual report states that the Commission responded to two requests – one from Spain and one from Belgium (para 146), with some further details in the accompanying Staff Working Paper – see table 1. European Competition Annual Report on Competition Policy 2010, COM (2011) 328 final; accompanying Commission staff working paper {SEC (2011) 690 final}. No Art 15(1) opinions are mentioned in the 2011 annual report, European Commission Annual Report on Competition Policy 2011, COM (2012) 253 final

functioning of Regulation 1/2003 reports 18 opinions as at 31 March 2009.⁸¹ I have been able to locate 18 cases to that date, with varying degrees of success in identifying the parties and in tracing the proceedings in the national jurisdictions. It is not possible to confirm whether some have been double counted because of unknown case names and details. Only five cases are now reported on DG COMP's website.⁸² This in itself demonstrates a lack of transparency. It is also notable that generally there is much more detail on the cases in the European Commission's Annual Reports pre-2004. I have been able to locate a further five cases since the date of the Commission's 2009 report, bringing the current total to 23. Table 1 below summarises the cases.

Given that the Commission has not yet made public its opinions in most individual cases, it is a difficult task to match up the cases where the Commission has delivered an opinion with the corresponding national judgments applying EU antitrust rules, especially where the parties are not disclosed in DG COMP's national court judgments database for confidentiality reasons or because the database has not been updated. However, matching is possible through some NCAs' annual reports, European Commission Annual Reports on Competition Policy⁸³ and national case databases.

In each case I aim to discover in what circumstances national judges use this tool; what questions were asked of the Commission; the content and nature of the Commission's advice, for example purely factual, economic or legal; and the impact of the Commission's opinion on the judge – how closely s/he follows it. This will feed into the discussion on the relationship with and implications for the judicial preliminary reference procedure.

⁸¹ Communication from the Commission to the European Parliament and the Council: Report on the functioning of Regulation 1/2003, COM (2009) 206 final, 8, and accompanying Commission staff working paper SEC (2009) 574, Brussels 29.4.2009, pp. 75-76, paras [277]-[278]: "As of 31 March 2009, the Commission has issued opinions on 18 occasions to national courts in Belgium (5), Spain (9), Lithuania (1), The Netherlands (1) and Sweden (2)." However, these cases are unnamed.

⁸² http://ec.europa.eu/competition/court/antitrust_requests.html (last accessed 7.9.2012)

⁸³ http://ec.europa.eu/competition/publications/annual_report/index.html European Commission Annual Report on Competition Policy 2004, SEC (2005) 805 final vol I, 55; European Commission Annual Report on Competition Policy 2005, SEC (2006)761 final, 73, para [219]; European Commission Annual Report on Competition Policy 2006, COM (2007) 358 final, 33. Commission Staff Working Document, SEC (2008) 2038, 16.6.2008, 101- Annex To The European Commission Annual Report On Competition Policy 2007, COM (2008) 368; European Commission Annual Report on Competition Policy 2008, COM (2009) 374 final, 28, simply states that "the Commission received several requests for opinions which were pending at the end of the year."

TABLE 1: European Commission opinions to national courts under Article 15(1) Regulation 1/2003

Case name	Member State	Court	Sector	Facts	Commission opinion	Commission opinion sought (1), delivered (2), judgment delivered (3)
1. Emond v Brasserie Hacht 2004/MR/6 ⁸⁴	Belgium	Brussels Court of Appeal (referred from Liège Court of Appeal on 9.9.2004) ⁸⁵	Beer ties (exclusive purchasing agreements - EPA)	Brewery, Brasserie Hacht, concluded 10-yr EPA for beer with buyer, Emond, in 1993. 4 yrs later concluded 5-yr EPA for beverages other than beer. Brewery had been guarantor of Emond's bank loan, penalties in case of EPA breach. Bar out of business in Sept 1999; Emond claimed brewery shared liability. Court decided relevant point was	Q: compatibility with Art 81 of concurrent EPAs; if incompatible, scope of 81(2) nullity. On compatibility, Com referred to its <i>de minimis</i> notices ⁸⁶ , block exemption notifications ⁸⁷ ; CJEU's <i>Delimitis</i> on how to assess market foreclosure. On scope of nullity, CJEU <i>Courage v Crehan</i> ⁸⁸ .	4.2.2005 (2) 23.6.2005 (3)

⁸⁴ Belgian (non-confidential) judgments from DG Comp national court judgments database: http://ec.europa.eu/competition/antitrust/national_courts/court_2005_027_be.pdf (accessed 17.8.2010). Opinion itself available at: http://ec.europa.eu/competition/court/antitrust_requests.html; http://ec.europa.eu/competition/court/brasserie_haacht.pdf (accessed 17.8.2010). 2005 European Commission annual report, p. 67 (unnamed); supplement 2005 p. 139-140; Belgian conseil de la concurrence annual report 2004 (including 2005 cases, published 2006): http://mineco.fgov.be/organization_market/competition/competition_council/annual_reports/report_competition_2004.pdf (accessed 22.6.2006 - no longer available online, but hard copy on file), 52-55

⁸⁵ The Court of Appeal in Brussels asked for the Commission's opinion in the following three cases. Belgium has a domestic preliminary reference system (art 42, superseded 1999 Protection of Economic Competition Act (LPCE)) in which lower courts can ask for an opinion, at the time from the Brussels Court of Appeal, and it is in this context that the Commission's guidance was sought. The competence to deliver preliminary rulings has since been transferred to the Belgian Court of Cassation: Art 72-74 LPCE (in force 15 September 2006).

⁸⁶ Most recently Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community, OJ C 368/07, 22.12.2001, 13

⁸⁷ Commission Regulation (EEC) No. 1984/83 of 22 June 1983 on the application of Article 85(3) [now 101(3)] of the Treaty to categories of exclusive purchasing agreements OJ L 173, 30.6.1983 expired 31.5.2000, subsequent Commission Regulation (EC) No. 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices OJ L 336, 29.12.1999

⁸⁸ C-453/99 *Courage v Crehan* [2001] ECR I-6297

Case name	Member State	Court	Sector	Facts	Commission opinion	Commission opinion sought (1), delivered (2), judgment delivered (3)
				not conclusion of second exclusive purchasing agreement for beverages other than beer, but moment of its breach. Considering Com's notices, EPA covered by block exemption notices as market share did not exceed 30% (was not higher than 10-15%), non-compete clause no longer than 5 yrs. Contract compatible with Art 101. Emond unsuccessful.		
2. SABAM v Productions & Marketing 2004/MR/7 ⁸⁹	Belgium	Brussels Court of Appeal (referred from Brussels Commercial Court)	Collecting societies	Whether SABAM, collecting society protecting music right-holders, abused dominant position by tying grant of licence to other conditions; refusing to give reasons for its conditions; creating entry barriers by unjustifiably favouring firms already in the market for organisation of concerts. P&M, concert organiser needed	Q: compatibility with Art 102, esp. discrimination (102(c)), of collecting society's criteria for granting status of 'grand organisateur' entitling 50% rebate on royalties. Com referred to its decisional practice in sector, rehearsing factors which can be taken into account to assess whether criteria themselves, or their application,	4.2.2005 (2) 3.11.2005 (3)

⁸⁹ Belgian (non-confidential) judgments from DG Comp national court judgments database: http://ec.europa.eu/competition/antitrust/national_courts/court_2005_038_be.pdf.
Opinion itself available at: http://ec.europa.eu/competition/court/antitrust_requests.html; <http://ec.europa.eu/competition/court/sabam.pdf>; Commission annual report 2005, p. 67-68 (unnamed); 2005 supplement, p. 140-141; Belgian conseil de la concurrence annual report 2004, p. 55-57

Case name	Member State	Court	Sector	Facts	Commission opinion	Commission opinion sought (1), delivered (2), judgment delivered (3)
				to obtain copyright licences from SABAM. Only SABAM issued licences in Belgium. Refused to grant P&M status of 'grand organisateur', denying benefit of 50% reduced tariff. P&M contested bills, SABAM initiated proceedings. P&M argued that as SABAM was the only operator of its kind in Belgium, market entry difficult. Court found criteria lacked clarity and transparency, specifically designed to discriminate – criteria not public, unwritten, unknown in advance. Excessive differential between tariffs paid for copyright, and SABAM gave no objective or economic justification. Breach of Art 102.	may breach Art 82. Com referred to Belgian as well as EU jurisprudence on dominance. Explicitly stated its opinion was not binding and only valid where trade between Member States likely to be affected by practices alleged.	
3. Wallonie Expo v FEBIAC 2004/MR/8 ⁹⁰	Belgium	Brussels Court of Appeal (referred from Brussels Commercial	Trade fairs/exhibitions	Commercial Court did not mention EC law in reference to Court of Appeal, maintained that	Q: compatibility of Arts 101&102 with agreement between organiser of truck exhibition,	4.2.2005 (2) 10.11.2005

⁹⁰ Belgian (non-confidential) judgments from DG Comp national court judgments database: http://ec.europa.eu/competition/antitrust/national_courts/court_2005_039_be.pdf.
Opinion itself available at: http://ec.europa.eu/competition/court/antitrust_requests.html, <http://ec.europa.eu/competition/court/febiac.pdf>; Commission annual report 2005, p. 67 (unnamed); 2005 supplement, p. 141; Belgian conseil de la concurrence annual report 2004, p. 57-63

Case name	Member State	Court	Sector	Facts	Commission opinion	Commission opinion sought (1), delivered (2), judgment delivered (3)
		Court Tribunal de Commerce/Rechtbank van Koophandel)		<p>relevant geographic market national, so only Belgian law applicable. However, Competition Council submitted written observations that capable of affecting trade between Member States, Court of Appeal agreed.</p> <p>Court found prohibition on exhibiting elsewhere within 6 mths capable of restricting competition. However, relevant market was national, option remained for exhibitors to participate in events abroad. Not 81(1) unlawful. But, prohibition on participation in another exhibition in the 6 mths prior to one in question was unjustified and disproportionate. Putting that clause into effect would breach Art 102.</p>	<p>WEX, and federation of truck exhibitors, importers and distributors, FEBIAC, not to take part in any similar event in Belgium in 6 mths prior to the exhib.</p> <p>Belgium system of notification of agreements capable of restricting competition on national market under Art7(1) LPCE. Com indicated fact that FEBIAC regulation had not been notified to Competition Council had no bearing on its legality. Still had to be examined under Art 101</p> <p>Recalling its decisional practice in sector, Com noted it had generally exempted prohibition clauses in regulation of fairs and exhibits on basis of 101(3), but exception should not be applied automatically - needs economic analysis of real and potential effects of clause on market, requiring delimitation of geographic market, and assess whether agreement capable of</p>	(3)

Case name	Member State	Court	Sector	Facts	Commission opinion	Commission opinion sought (1), delivered (2), judgment delivered (3)
					foreclosing competitors. Opinion clarified relationship between Art 101&102 and indicated that efficiencies can be considered in Art 102 assessments. ⁹¹	
4. <i>Unknown</i> ⁹²	Belgium	Antwerp Court of Appeal. Gerechtshof Antwerpen	Ports (indemnity clause)	Fatal accident at Antwerp port in 1995 where ship hit container crane. Central issue was liability of pilot and company holding concession for pilot services in Antwerp port.	Q: compatibility with Art 102 of terms of concession-holder's pilotage contract, incl. indemnity and exclusion of liability clauses - whether contractual exclusion of liability is abuse of dom pos. Com laid out case law on exploitative abuses and unfair trading conditions under 102(a), esp <i>BRT v SABAM</i> . Key was whether dominant firm would have been able to impose similar exclusion of liability if there had been effective competition. Further, Court should proportionality of consider whether restrictive effects of contractual clause. Liability	2006

⁹¹ Commission annual report 2005, p.75

⁹² Commission annual report 2006 supplement p. 123-124 (unnamed)

Case name	Member State	Court	Sector	Facts	Commission opinion	Commission opinion sought (1), delivered (2), judgment delivered (3)
					clause should be considered in context of whole contract and relevant circumstances.	
5. <i>Unknown</i> ⁹³	Belgium	<i>Unknown</i>	<i>Unknown</i>	applicability of Articles 101 and 102 to the exclusion of one of the members of a standards setting organisation	Unknown	2006?
6. <i>Unknown</i> ⁹⁴	Spain	<i>Unknown</i>	Retail sale of automotive fuel	Whether service station operator could use Art 101 as a defence to be released from a contractual obligation.	Q: whether size and nature of network of Spanish supplier could affect trade between Member States; whether exclusive supply contract between the parties could be exempt under 101(3). Com indicated how network of exclusive supply contracts can lead to foreclosure, outlined how to assess in line with <i>Delimitis</i> , its	2005

⁹³ Communication from the Commission to the European Parliament and the Council: Report on the functioning of Regulation 1/2003, COM (2009) 206 final, p. 8, and accompanying Commission staff working paper SEC(2009)574, Brussels 29.4.2009, p. 80. Investigated available Belgian Competition Authority annual reports 2005-2009 but could find no corresponding case. http://economie.fgov.be/en/entreprises/competition/Belgian_Competition_Authority/Annual_Reports/index.jsp. 2005 and 2006 on French site: http://economie.fgov.be/fr/entreprises/concurrence/Autorite_belge_concurrence_Introduction/Conseil_concurrence/index.jsp (accessed 11.8.2010)

⁹⁴ Commission annual report 2005, p. 75-76 (unnamed).

Case name	Member State	Court	Sector	Facts	Commission opinion	Commission opinion sought (1), delivered (2), judgment delivered (3)
					own guidelines and notices, and Art 27(4) notice ⁹⁵ published in its <i>REPSOL</i> investigation ⁹⁶ . Re exemption, Com simply referred to its 101(3) guidelines.	
7. <i>Unknown</i> ⁹⁷	Spain	<i>Unknown</i>	Retail sale of automotive fuel	Unknown	Q: compatibility with Art 101 of non-compete clause, specifically resale price maintenance (RPM), whether agreement could be covered by block exemption, and whether service station operator could be defined as an agent. As above, Com referred to <i>Delimitis</i> , its own guidelines and notices, and the Art 27(4) notice in <i>REPSOL</i> on assessing market foreclosure and individual exemption under 81(3). Outlined criteria for assessing whether retailer is an agent by referring to	2005

⁹⁵ Article 27(4) Regulation 1/2003: “Where the Commission intends to adopt a decision pursuant to Article 9 [commitments] or Article 10 [finding of inapplicability], it shall publish a concise summary of the case and the main content of the commitments or of the proposed course of action. Interested parties may submit their observations within a time limit which is fixed by the Commission in its publication and which may not be less than one month. Publication shall have regard to the legitimate interest of undertakings in the protection of their business secrets.”

⁹⁶ COMP 38.348 – REPSOL, OJ C 258, 20.10.2004, 7-11

⁹⁷ Commission annual report 2005, p.75-76 (unnamed)

Case name	Member State	Court	Sector	Facts	Commission opinion	Commission opinion sought (1), delivered (2), judgment delivered (3)
					its guidelines. Clauses providing for a hardcore restriction on RPM are void if not part of a genuine agency contract But, for Court to decide whether a clause it might find void could be severed from the contract or whether it vitiated contract as a whole.	
8. Clau v Cepsa Estaciones de Servicio, Case n° 48/2004. ⁹⁸	Spain	Provincial Court Girona No. 1, Audiencia Provincial de Girona (on appeal from Girona Court of First Instance No 1, case No 266/2002)	Retail sale of automotive fuel	Contracts for start-up of service station and exclusive sale of CEPESA products. Whether contract was re-sale agreement or a genuine agency agreement.	Not known	7.6.2004 (3) Contract was a “re-sale agreement”. Actually agency agreement. Invalid as did not fall under block exemption regulations. Contracts void. Parties

⁹⁸ http://ec.europa.eu/competition/publications/annual_report/2004/aeccr_en.pdf Annual Report on competition 2004 part III: the Application of EC Competition Rules in the Member States, pp. 57-58; FIDE 2008 Spain country report (in H F Koeck and M M Karollus (eds) Fide Congress 2008, Vol. 2: *The Modernisation of European Competition Law - Initial Experiences With Regulation 1/2003* (Nomos / facultas.wuv, 2008), p. 307 lists 5 cases “among others” in which there was a Commission opinion. However, the report gives no details.

Case name	Member State	Court	Sector	Facts	Commission opinion	Commission opinion sought (1), delivered (2), judgment delivered (3)
						to reimburse each other for services provided
9. Inversiones Cobasa v BP Oil ⁹⁹ case no. 103/05	Spain	Juzgado de lo Mercantil No. 4 of Madrid	Retail sale of automotive fuel	Whether contract was re-sale agreement or a genuine agency agreement.	Q: whether any Com proceedings related to BP Oil contracts; whether these networks of contracts can produce an effect on trade between Member States; whether such agreements could be exempted by block exemption or individual under Art 101(3) TFEU; 5 year exclusivity clause Com opinion not known	9.2.2005 (1) 19.10.2005 (3) legal nature of the contract is similar to above - not a re-sale agreement but an agency contract. Not genuine agency agreement - retailer assumes some financial risk. However, size and type of

⁹⁹ Sixth recital of court judgment available at http://ec.europa.eu/competition/antitrust/national_courts/court_2005_064_es.pdf (included in DG COMP national court judgment database) . FIDE 2008 Spain country report, p. 307, reports that the Commission opinion was requested in Provincial Court Madrid no. 28 and judgment was given on 6.2.2007, but actually it was requested in the first instance proceedings. Reference to court judgment in Supplement to Commission's annual report on competition policy 2005 http://ec.europa.eu/competition/publications/annual_report/2005/report_supplement_20061113.pdf, p. 147

Case name	Member State	Court	Sector	Facts	Commission opinion	Commission opinion sought (1), delivered (2), judgment delivered (3)
						networks do not affect trade between MS, No resale price maintenance imposed. On duration, contract benefited from block exemption.
10. Grupo Texas v Cepsa (case no. not known) ¹⁰⁰	Spain	Provincial Court of Madrid no. 10	Retail sale of automotive fuel	Currently unable to trace	Unknown	17.10.2005 (3)
11. Gasonul v Repsol (case no. not known) ¹⁰¹	Spain	Provincial Court of Madrid no. 14	Retail sale of automotive fuel	Currently unable to trace	Unknown	26.3.2004 (3)
12. Hermela v Repsol (case no. not known) ¹⁰²	Spain	Provincial Court of Madrid no. 14	Retail sale of automotive fuel	Currently unable to trace	Unknown	30.9.2004 (3)
13. UAB Tew Baltija Kaunos v	Lithuania	Vilnius District Court (Vilnius Apygardos	Public tender	Whether long-term exclusivity would allow tender winner to	Q: compatibility with Art 106(1) & Art 102 of municipality	14.12.2005 (3)

¹⁰⁰ FIDE 2008 Spain country report, p. 307

¹⁰¹ FIDE 2008 Spain country report, p. 307

¹⁰² FIDE 2008 Spain country report, p. 307

Case name	Member State	Court	Sector	Facts	Commission opinion	Commission opinion sought (1), delivered (2), judgment delivered (3)
savivaldybes administracijos direktorius (Director of administration of the municipality of the city of Kaunas) Case 2-1068-52/05 ¹⁰³		Teismas)		abuse dominant position by charging excessive prices to certain clients.	carrying out public tender procedure for exclusive 15 yr waste collection contract. Com gave sectoral advice, referring to Art 102 waste management cases <i>Københavns</i> and <i>Dusseldorp</i> , and Com notice on definition of relevant market ¹⁰⁴ . In <i>Københavns</i> , breach of EC competition rules was justified under Art 106(2) relating to public undertakings. Substantial standard of proof for finding breach of Art 102 or 106(1) – abuse by the successful concession-holder would have to be “ <i>inevitable</i> or at least the <i>likely</i> result of tender conditions”. ¹⁰⁵	
14. Danska Staten genorn Bornholmstrafiken v Ystad Harnn Logistik	Sweden	Swedish Supreme Court (on appeal from Ystad District Court Tingsrätt) Högsta	Ports	Port of Ystad allegedly abused dominant position by charging excessive prices for port services. Com opinion took similar	Q: definition of the relevant market Com advised should define market according to whether or	18.10.2006 (1), 1.3.2007 (2) [taking longer than

¹⁰³ Commission annual report 2005, p. 76-77 (although not named); Lithuanian Competition Council Annual report 2005, English version, p. 25, available at http://www.konkuren.lt/en/annual/2005_eng.pdf (accessed 13.8.2010); judgment available from DG COMP national court judgments database (in Lithuanian) at http://ec.europa.eu/competition/antitrust/national_courts/court_2006_10_lt.pdf (accessed 17.8.2010)

¹⁰⁴ OJ C 372, 9.12.1997, 1

¹⁰⁵ Commission annual report 2005, p. 77

Case name	Member State	Court	Sector	Facts	Commission opinion	Commission opinion sought (1), delivered (2), judgment delivered (3)
Aktiebolag Case T-2808/05 ¹⁰⁶		Domstolen		approach to Swedish High Court, which had ruled that the Port of Trelleborg was not a substitute as this would increase ferry operators' costs and reduce customer base.	not other ports were substitutes, referred to ECJ and Commission decisional practice in other port sector cases in assessing demand and supply substitution. National court should decide whether port services offered would constitute single or several markets. CJEU previously found that organisation of port activities in a single port may constitute a relevant market. Com stated that its opinion was not binding, would not carry out independent assessment of market or consider merits of case, only clarify criteria and evidence for determining relevant market. Court declared its lack of jurisdiction in respect of share of fees due to arbitration clause, but	target 4mths in Courts notice] ¹⁰⁷ 19.2.2008 (3)

¹⁰⁶ Commission annual report 2007 Staff working paper (SWP), p.142-143. F Lindblom, 'The Swedish Supreme Court asks for the EC Commission's opinion on the definition of the relevant market concerning alleged excessive prices for port services (Port of Ystad)', 1 March 2007, e-Competitions, n°13747; C Wetter & C J Sundqvist, 'The Swedish Supreme Court declares itself lacking jurisdiction as a result of an arbitration clause (BornholmsTrafikken/Ystad Hamn)', 19 February 2008, e-Competitions, n°21218. Judgment available on Swedish Supreme Court's website (in Swedish): <http://www.hogstodomstolen.se/Domstolar/hogstodomstolen/Avgoranden/2008/2008-02-19%20T%202808-05%20Dom.pdf> (accessed 17.8.2010)

¹⁰⁷ There is some discrepancy concerning the date: the Commission's website states the opinion was delivered on 16.2.2007, which would keep it within the target time limit.

Case name	Member State	Court	Sector	Facts	Commission opinion	Commission opinion sought (1), delivered (2), judgment delivered (3)
					followed the Commission's opinion on market definition and decided the port was dominant.	
15. Övertorneå kommun m.fl. v Ekfors Kraft AB m.fl. A 4/06; MD 2007:26 ¹⁰⁸	Sweden	Swedish Market Court (Marknadsdomstolen)	Public tender	2 municipalities in north Sweden had agreement with dominant electricity provider, Ekfors, for provision of public network services and lighting. Disagreement about level of fees, Ekfors discontinued services.	Q: notions of 'undertaking'; whether public authority has 'legitimate interest' for purpose of lodging a complaint under Art 7(2) Reg 1/2003 - whether municipalities should have standing in domestic court under Swedish Competition Act. Com outlined criteria to distinguish (non-economic) public authority activity from economic activity. On legitimate interest, referred to Com notice on handling of complaints. Court found street lighting not an essential facility, rejected refusal to supply and excessive prices claim	21.12.2006 (1) ???.2007(2) 15.11.2007(3)

¹⁰⁸ Commission annual report 2007 SWP, p.142; FIDE 2010 Sweden country report in G C Rodriguez Iglesias & L Ortiz Blanco (eds) *The Judicial Application of Competition Law: Proceedings of the FIDE XXIV Congress Madrid 2010 Vol 2* (Servicio de Publicaciones de la Facultad de Derecho, Complutense University, Madrid 2010), p. 32, available at http://www.fide2010.eu/multisites/fide2010/templates/yoo_beyond/pdf/suecia/Suecia-2.PDF (accessed 17.8.2010); A Flood & A Jasper 'The Swedish Market Court rejects action for alleged abuse of dominant position in the electricity sector (*Ekfors*)', 15 November 2007, e-Competitions, n°15760; J Lundström & M Lindgren 'The Swedish Market Court holds that the electricity network for municipalities street and road lighting is not an essential facility and rejects alleged abusive refusal to supply and price increase (*Ekfors*)' 15

Case name	Member State	Court	Sector	Facts	Commission opinion	Commission opinion sought (1), delivered (2), judgment delivered (3)
16. Praet en Zonen v Verenigen Productenorganisatie van de Nederlandse Mosselcultuur UA C02/1136, LJN: BD 1227 ¹⁰⁹	Netherlands	Appeal Court 's Gerechtshof Gravenhage (on appeal from Rechtbank Middelburg)	Agricultural quotas	Mussel seed quota allocations by an association of mussel farmers. Court of Appeal also invited Commission to submit observations under Art 15(3)	Q: whether the EU competition rules applied, or whether such allocation practice fell within specific scope of Reg 26/62 on application of competition rules to agricultural products. Com replied that it appeared to be within the scope of the agricultural products regulation. Court followed the Commission's decision as it had exclusive power under Art 2(2) of the agriculture reg to determine which practices fulfilled art 2(10) of the reg. Court held that the decision did not breach 101(1)	???.2005(1) ?.4.2006(2) ¹¹⁰ 24.4.2008(3)
17. BVBA DD Bikes/BV Ducati	Belgium	Rechtbank van Koophandel	Motorcycles (sale, repair and	DD Bikes, former authorised dealer and repairer brought	Q Whether Ducati's distribution system could benefit from block	2009

November 2007, e-Competitions, n°16061. Judgment available on Market Court's website (in Swedish) at <http://www.marknadsdomstolen.se/avgoranden/avgoranden2007/Dom07-26.pdf> (accessed 17.8.2010)

¹⁰⁹ Study on the conditions of claims for damages in case of infringement of EC competition rules 2005, Netherlands report, p. 22 http://ec.europa.eu/competition/antitrust/actionsdamages/national_reports/netherlands_en.pdf; Commission annual report 2006 supplement SWP p. 123 (unnamed); T Baumé & S Janssen, 'The Dutch Court of Appeal of The Hague, after having sought the opinion of the EC Commission, holds that a decision adopted by a mussel farmers association did not breach Art. 81.1 EC (*Vereniging Productenorganisatie van de Nederlandse Mosselcultuur / Praet en Zonen*)', 24 April 2008, *e-Competitions*, n°21781); judgment available (in Dutch) at www.rechtspraak.nl; FIDE 2008 Netherlands country report, p. 216

¹¹⁰ Commission annual report 2006 staff working document, SEC (2007) 860, Brussels 25.6.2007, p. 123, 2.1.1. Available at http://ec.europa.eu/competition/publications/annual_report/2006/part2_en.pdf

Case name	Member State	Court	Sector	Facts	Commission opinion	Commission opinion sought (1), delivered (2), judgment delivered (3)
North Europe (case no. Unknown) ¹¹¹		Dendermonde (Commercial District Court)	maintenance)	action against Ducati for failure to be admitted to network.	exemption reg 2790/1999 on vertical restraints. Com said first establish whether there is separate market for repair and maintenance, as opposed to sales; if so Ducati's market share as supplier of spare parts is relevant – if exceeds 30% could still benefit from individual exemption under 101(3). If no separate market, share is likely to be less than 30%, falling under BE.	
18. UAB Schneidersöhne Baltija/UAB Libra Vitalis A337/2008 of 9.9.2008; A502-34/2009 of 20.11.2009 modifying NCA decision (re Resolution No. 2S-13 of 26 October 2006) ¹¹²	Lithuania	Lietuvos vyriausasis administracinis (Supreme Administrative Court)	Paper industry	Assessment of information exchange relating to market shares and sales volumes on paper wholesale markets. Lower court reduced competition authority fine but rejected the substantive parts of the appeal. Parties admitted exchanges of info, but argued they did not breach either EU or national competition law, as Art 101 infringement <i>only</i> where the	Assessment depends on whether agreement by object or by effect. If by object, no need to consider market structure. If by effect, need to consider both actual and potential effects, real conditions on the market. Detailed citation of EU courts' case law and Com decisions, esp recent decisions in paper cases: C-7/95 P [1998] ECR I-3111 & T-35/92 <i>John Deere</i> ; C-238/05 <i>Asnef-Equifax v</i>	(1) 9.9.2008 (2) 2008? ¹¹³ (3) 20.11.2009

¹¹¹ Commission annual report supplement SWP 2009 p. 117

Case name	Member State	Court	Sector	Facts	Commission opinion	Commission opinion sought (1), delivered (2), judgment delivered (3)
				relevant market is oligopolistic, competition on the market is not sufficient and the info exchanges allow the prediction of competitors' behaviour on the market. Qs: (1) do high concentration and oligopolistic market both have to be established to prove infringement by effect? Whether HHI values could be used, even though Com's guidelines on horizontal cooperation specifically state they do not apply to info sharing agreements (para 10) A: can use the methodology for analysis of market structure HHI, and leading firm concentration ratio (2) Other factors? (3) seeking answer in given factual	Asociación de Usuarios de Servicios Bancarios) Com dec in IV/31.370 & 31.446 OJ 1992 L 68, p. 19 <i>UK Tractor Exchange Thyssen Stahl</i> T-141/94 [1999] ECR II-347; <i>Suiker Unie</i> 40-48/73 [1975] ECR 1663, <i>Züchner v Bayerische Vereinsbank AG</i> 172/80 [1981] ECR 2021. Cited Com 101(3) guidelines on market structure para 25 OJ C 101. <i>DecisiPaper markets</i> 27.4.2004, p. 97), (<i>Atlantic Container</i> T-191/98, T-212-214/98 [2003] ECR II-3275, para 1154) Detailed citation of EU courts' case law and Com decisions, esp recent merger decisions in paper markets: COMP/2245 <i>Metsä-Serla/Zanders</i> ; M.3227 <i>Paperlinx/Buhrmann</i> ; M.3822	

¹¹² Commission annual report supplement SWP 2009 p. 118; DG COMP national court judgments database (in Lithuanian): A502-34/2009 of 20.11.2009 modifying NCA decision: http://ec.europa.eu/competition/antitrust/national_courts/1151910.pdf; A337/2008 of 9.9.2008 http://ec.europa.eu/competition/antitrust/national_courts/752814.pdf; Opinion itself available at: http://ec.europa.eu/competition/court/opinion_2002_uab_en.pdf. Supreme Administrative Court of Lithuania annual report 2008 p. 9 (that particular part in Lithuanian); Lithuanian Competition Council Annual report 2009, English version http://www.konkuren.lt/en/annual/2009_eng.pdf, p. 14 and p. 15 (accessed 13.8.2010)

¹¹³ As with the Swedish *Bornholmstrafiken* case, the date of the opinion is uncertain. On its website http://ec.europa.eu/competition/court/antitrust_requests.html the Commission dates the opinion as 20.7.2008, but according to the opinion itself the request was not received until 9.9.2008.

Case name	Member State	Court	Sector	Facts	Commission opinion	Commission opinion sought (1), delivered (2), judgment delivered (3)
				<p>circumstances, but Com refused to answer as would be going into merits: "Com has not carried out an independent assessment of these issues and it cannot substitute the analysis that the national court needs to make on the basis of the facts and information before it." (para 48).</p>	<p>Stora Enso/Schneidersöhne Papier. Even if Com has authorised merger, no obstacle to NCA finding oligopolistic/concentrated market in applying Art 101. Degree of market power needed for finding infringement of Art 101(1) less than for finding dominance under Art 102. Com merger decs not binding on application of antitrust rules. Advised caution on interpretation of these decisions: merger and Art 101 objectives, and therefore analysis, are different. Detailed prelim remarks on 15(1)</p>	
19. Bright Service SA/REPSOL CPP ¹¹⁴	Spain	Juzgado de lo Mercantil no. 2 Barcelona	Retail sale of automotive fuel (wholesale market for petroleum products)	Implications of Com's REPSOL decision COMP/38348 of 12.4.2006 – whether precludes NCAs and courts from assessing whether exclusive supply agreement part of the commercial REPSOL network has infringed competition rules	Commitment decisions, but oblig not to take a decision running counter - in practice conflicting with the implementation of commitments	24.3.2009 (1)
20. Dalphi Metal	Spain	Juzgado de lo	Car airbags and	Litigation following acquisition	Q1: Whether unilateral provision	2009 (1)

¹¹⁴ Commission annual report supplement SWP 2009 p. 118

Case name	Member State	Court	Sector	Facts	Commission opinion	Commission opinion sought (1), delivered (2), judgment delivered (3)
España/TRW Automotive ¹¹⁵		Mercantil no. 1 Madrid	steering wheels (motor vehicle parts)	by TRW of DME's car airbag and steering wheel business. Takata (competitor, minority stake in DME and shareholding in all 3 DME production joint ventures) brought action against DME's production companies which had refused to give it access to transfer prices charged to DME for certain products	of info to competitor could constitute exchange of info - A: mere receipt of info can be anti-competitive - reduces uncertainty [in effect, Com advises in favour of DME] Q2: exchange of historical data does not influence market conditions - no infringement. Info more than 1 year old can be historical, but obsolescence must be assessed according to the industry and market structure. [No cases appear to have been referred to]	29.3.2010 (2)
21. Petrocat/Canal y Fils SL & Zero Sets SL ¹¹⁶	Spain	Juzgado de lo Mercantil no. 5 Madrid	Retail sale of automotive fuel	Whether long term exclusive supply contract (27yrs+) infringes Art 101	Assessment of foreclosure in context of overall comp situation and economic and legal links (referring to REPSOL and Spanish CA in CEPSA). Re clauses setting retail price, Com's distinguishes contracts according to ownership and degree of risk, in identifying whether service station merely an agent. If not genuine agent [see	2009

¹¹⁵ Commission annual report supplement SWP 2009 p. 118-119; (see also Commission annual report 2010 SWP para 403)

¹¹⁶ Commission annual report supplement SWP 2009 p. 119

Case name	Member State	Court	Sector	Facts	Commission opinion	Commission opinion sought (1), delivered (2), judgment delivered (3)
					cases above], would violate Art 101. Art 5(a) vertical restraints BE reg 2790/1999 – exclusivity agreements only exempt if mkt share less than 30%, if remaining duration on 1 Jan 2003 less than 5 yrs, if sold by buyer from premises owned by supplier or rented to 3 rd parties not connected with buyer. (i.e. by agent) Conditions to be interpreted restrictively – “do not appear to have been met in this case” [Com makes factual finding]	
22. Dalphi Metal (as above) ¹¹⁷	Spain	Juzgado de lo Mercantil nº4 of Madrid	Retail sale of automotive fuel	See case 20 above	Same as in case 20 above. Communicated that same opinion to the new court	29.3.2010 (2)
23. <i>Unknown</i> ¹¹⁸	Belgium	Tribunal de Commerce de Bruxelles/Rechtbank van koophandel Brussel	Smart mobile phones	Definition of relevant market, Art 102 related to sales of smart mobile phones. Vertical distribution agreement. Refusal to supply and discriminatory practices.	Qs: assessment of relevant market; vertical distribution agreement and unilateral practices Re assessment of the relevant market, Com stated need to	17.12.2009 (2)

¹¹⁷ Commission annual report 2010SWP p. 107-8, para [403]

¹¹⁸ Commission annual report 2010 SWP p. 147, para [402]

Case name	Member State	Court	Sector	Facts	Commission opinion	Commission opinion sought (1), delivered (2), judgment delivered (3)
					<p>assess degree of substitutability and interchangeability of products. Re assessment of dominant position Com referred to case-law of the EU courts [do not know which].</p> <p>Com suggested court should examine whether different treatment by dominant undertaking of certain partners distorts competition in the retail market and harms consumers.</p>	

Summarising the table, opinions were delivered in the following Member States: Spain (11), Belgium (7), Sweden (2), Lithuania (2), The Netherlands (1). The level of court was: Supreme Court: 2; Appeal Court: 10 (although in the Belgian cases the Brussels Court of Appeal acted in a domestic preliminary reference capacity); First instance court: 8 (3 unknown).

5.1.1 Content of the opinions and implications for the preliminary reference procedure

The preliminary reference procedure has been characterised as a dialogue between courts.¹¹⁹ It might be remarkable that a judge would seek an opinion or accept an intervention from the European Commission as a (supranational) administrative body. Having summarised the cases in which an opinion was sought, this section drills deeper into the detail of some of those opinions, and consider the implications for the preliminary reference procedure. In some opinions, the Commission simply restates the law, whereas in others it appears to go further. For example, in the *Petrocat* case (no. 21 in the table) the Commission appears to make a factual finding.

For the purposes of the Courts Notice, ‘courts of the Member States’ are defined as “those courts and tribunals within an EU Member State that can apply Articles [101 and 102 TFEU] and that are authorised to ask a preliminary question to the [CJEU]”.¹²⁰ So by definition, courts requesting an opinion from the Commission under Art 15 are also entitled to request a preliminary reference from the CJEU. The way in which the request to the Commission is suggested to be drafted bears striking similarity with requests to the CJEU. The guidance on DG COMP’s website¹²¹ states that the request should be limited to ten pages, and should state the subject matter of the case, findings of fact the court has already made, reasons prompting the court’s request for assistance, a summary of the parties’ arguments, and the questions themselves in a separate section. This guidance, even at several points its exact wording, is clearly modelled on the CJEU’s own information note on references for a preliminary ruling.¹²² Far from some national courts being concerned about the Commission being too interventionist, there are reports that some

¹¹⁹ K. Alter, ‘Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration’ in A-M. Slaughter, A. Stone Sweet and J.H.H. Weiler (eds), *The European Courts and National Courts: Doctrine and Jurisprudence* (Hart, 1997), 227-251

¹²⁰ Point 1 of the Court notice

¹²¹ <http://ec.europa.eu/competition/court/requests.html> (accessed 13.2.2009)

¹²² Information Note on references from national courts for a preliminary ruling, OJ C 160, 28.5.2011, 1, [22]-[24]

judges are simply sending all the pleadings in the case and asking the Commission to make a decision¹²³ (for example, in the Spanish petrol cases).

The scope of the Commission's guidance may cover economic and factual questions in addition to legal ones, and in that sense has broader scope than a preliminary ruling. The opinions delivered so far have covered both general points of law and sector-specific issues. For example, in the Lithuanian *UAB Tew Baltija* case the Vilnius District Court was faced with the compatibility with Article 106(1) and Article 102 of a municipality carrying out a public tender procedure for an exclusive 15 year waste collection contract. The applicant in the case had argued that such long-term exclusivity would allow the tender winner to abuse a dominant position by charging excessive prices to certain clients. The Commission gave sectoral advice in its opinion, referring to the Article 102 waste management cases of *Københavns*¹²⁴ and *Dusseldorp*¹²⁵, in addition to the Commission notice on the definition of the relevant market. In the *Københavns* case, a breach of EU competition rules was justified under Article 106(2) TFEU relating to public undertakings. However, as well as pointing to its existing notices, the Commission also commented on the standard of proof needed to establish abuse of a dominant position, stating that abuse by the successful concession-holder would have to be 'inevitable or at least the likely result of tender conditions.'¹²⁶ (emphasis added) This appears to stray onto the territory of judicial deliberation.

In the Spanish courts there have been a number of cases on the validity of supply contracts between petrol station operators and oil companies, accounting for the vast majority of Spanish national court judgments notified to the Commission post-2004.¹²⁷

As mentioned above, interestingly at least one Spanish opinion sought was also the subject of a parallel preliminary references to the CJEU. In one of the cases, the Commission gave a

¹²³ E Gippini Fournier, 'The Modernisation of European Competition Law: First Experiences with Regulation 1/2003 (Institutional Report to FIDE Congress 2008) in H F Koeck and M M Karollus (eds) *FIDE Congress 2008, Vol. 2: The Modernisation of European Competition Law - Initial Experiences With Regulation 1/2003* (Nomos / facultas.wuv, 2008), 468

¹²⁴ Case C-209/98 *Entreprenørforeningens Affalds/Miljøsektion (FFAD) v Københavns Kommune* [2000] ECR I-3743

¹²⁵ Case C-203/96 *Chemische Afvalstoffen Dusseldorp BV and Others v Minister van Volkhuysvesting, Ruimtelijke Ordening en Milieubeheer* [1998] ECR I-4075

¹²⁶ Commission annual report 2005, 77

¹²⁷ http://ec.europa.eu/competition/elojade/antitrust/nationalcourts/?ms_code=esp (last accessed 7.9.2012). See also the Spanish NCA annual reports e.g. Annual report of the Comisión Nacional de la Competencia 2007, available at:

<http://www.cncompetencia.es/Inicio/ConocerlaCNC/Memorias/tabid/72/Default.aspx> (last accessed 9.9.2012) pp. 50-58, with details of cases notified to the Commission under Art 15(2) Reg 1/2003. However, there is no mention of Commission involvement. For some analysis of court practice see H Brokelmann 'Enforcement of Articles 81 and 82 EC under Regulation 1/2003: The Case of Spain and Portugal' (2006) 29(4) *World Competition* 535-554

definite statement of the law – clauses providing for a hardcore restriction on resale price maintenance are void if not part of a genuine agency contract – rather than indicating a general analytical framework. It indicated that the CJEU had previously held that provided it is possible to sever the anticompetitive provisions of a contract from the rest of the terms, the remainder of the contract is still valid and enforceable. It was for the national court to decide whether a clause it might find void could be severed from the contract or whether it vitiated the entire contract according to Member State’s contract law.¹²⁸ This is an example of the Commission restating and clarifying the law rather than establishing ‘rules of conduct’ in the soft law definition.

In the Belgian *SABAM* case,¹²⁹ the question was whether a collecting society’s criteria for granting the status of *grand organisateur* to certain commercial users, entitling them to a rebate of 50% on royalties payable, were compatible with Article 102 or whether they amounted to unlawful discrimination under that article (102(2)(c)). The Commission referred to its decisional practice in the sector, rehearsing factors which can be taken into account to assess whether the criteria themselves, or their application, may breach Article 102. But significantly, the opinion referred to Belgian as well as EU jurisprudence on dominance. It is rather unusual for a judge to be educated in this way on his own Member State’s law. The Commission could have been attempting to demonstrate the similarity in national and Union law in this area, making its advice more likely to be accepted. It also explicitly stated that its opinion was not binding and was only valid where trade between Member States was likely to be affected by the practices alleged.¹³⁰

The mechanism is couched in terms of assistance to the national court, rather than the Commission exercising its power to issue an opinion as under Article 211 EC. This is especially true given that judges can find existing guidance in case law, Commission regulations, decisions, notices, and guidelines, while still upholding their independence. Nevertheless, how the Commission’s interpretation of the law is treated by the national judge, and consequently its legal effect, is relevant to both Article 15 tools.

On the evidence of the opinions so far, national courts have not raised only points of clarification or sought advice on novel issues, nor used the opportunity simply to ascertain whether the Commission has initiated proceedings in a case.

¹²⁸ Case C-56/65 *Société Technique Minière v Maschinenbau Ulm* [1966] ECR 235 and Case C-319/82 *Société de Vente de Ciments et Bétons de L’Est v Kerpen & Kerpen GmbH* [1983] ECR 4173. See R Whish & D Bailey, *Competition Law* (OUP, 7th edn, 2012), 322 for a discussion.

¹²⁹ 2004-MR-7 *SABAM contre Productions et Marketing*

¹³⁰ Mentioned in Brussels Court of Appeal’s judgment 2004-MR-7 *SABAM contre Productions et Marketing*, 2005/7059, 3 November 2005, 6

For its part, it is notable that in all the opinions given, the Commission indicates existing case law and guidelines even though the opinion mechanism was intended for situations where existing guidelines do not offer sufficient guidance (according to paragraph 27 of the Courts Notice). It could be argued that the Commission is not seeking to be too interventionist, but only to summarise the applicable law for the court. Indeed, there is anecdotal evidence that there have been cases where the Commission has refused to give an opinion, especially where the request was made by a lower court.¹³¹ However, in some cases it does go further – as discussed above, in the Lithuanian case it commented on standard of proof, and it indicated Belgian domestic competition law provisions in *SABAM*.

Leaving aside the Commission's own-initiative interventions under Article 15(3), from the perspective of incentives and preferences of judges,¹³² referring to the Commission under Article 15(1) is less drastic and disruptive to proceedings than a reference to the CJEU. An obvious advantage of consulting the Commission rather than the CJEU is a practical issue of time constraints – whereas the indicative deadline for provision of an opinion is four months, a preliminary ruling can take at least a year. A shorter stay of proceedings is much less disruptive to the case. For example, the Spanish Supreme Court referred preliminary questions in the context of the petrol station cases in March 2005, on resale price maintenance in exclusive fuel purchasing agreements, and agency contracts between service station operators and oil companies, in particular whether petrol stations should be regarded as resellers or agents.¹³³ The CJEU's ruling was delivered in December 2006, at least a year after the questions put to the Commission in the same case.

Another advantage in seeking a Commission opinion is the lack of admissibility issues, as any court or tribunal may ask advice on a broad range of economic, factual or legal questions. It may also contribute to relieving the caseload of the Union Courts. Given the heavy caseload, the CJEU has itself tried to limit unnecessary references, encouraging self-restraint of national courts.¹³⁴ In respect of lower courts' discretionary references, Advocate General Jacobs in the *Wiener* case suggested that lower courts should only refer

¹³¹ Global Competition Review Report: Modernisation in Europe 2005, country report on Germany, 55, response to question 29.

¹³² W Mattli and A-M Slaughter, 'The Role of National Courts in the Process of European Integration: Accounting for Judicial Preferences and Constraints' in A-M Slaughter, A Stone Sweet and J Weiler (eds), *The European Courts and National Courts: Doctrine and Jurisprudence* (Hart, 1997), 253-276

¹³³ Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA* [2007] 4 CMLR 5. The court stipulated that a resale price maintenance clause was not covered by block exemption.

¹³⁴ Another way of limiting preliminary references is through the admissibility criteria, such as the meaning of a court or tribunal. The way in which the CJEU limits references from quasi-judicial bodies, including competition authorities, was explored in the previous chapter.

where there was a question of general importance likely to promote uniform application of law throughout the EU.¹³⁵ Obligatory references from the highest courts are constrained by the *acte éclairé* and *acte clair* conditions in *CILFIT*.¹³⁶

Faced with these messages, the possibility to ask the Commission for advice may actually empower lower courts. This relates to Member States' domestic institutional relationships between executive agencies and the judiciary. By asking for information directly from the Commission, a national court, if it so wishes, can bypass its own NCA, which could otherwise raise the case relatively informally within the European Competition Network. National judges may be more comfortable with obtaining information themselves independently rather than through an intermediary. On the other hand, if there is already such a tradition in national procedural law, it may mean that Article 15 of the Regulation is used more readily in those Member States. Most Member States have provision in their national law for the NCA to become involved or give advice in private enforcement cases.¹³⁷ As noted above, in the Regulation 1/2003 negotiations, some Member States had proposed that their national competition authorities act as intermediaries between the courts and the Commission.¹³⁸

As revealed by the Commission staff working paper on Art 15(3) discussed above, one intended purpose of the *amicus curiae* mechanism in the EU's decentralised competition regime was to alert judges to decisions in other Member State courts.¹³⁹ A similar effect could result through the information passed in opinions. This could create an informal network, through a flow of cooperation vertically up between the Commission and a Member State court and back down to another Member State judge. Until judges have effective direct horizontal links with each other, cooperation could be strengthened through vertical links with the Commission. The Commission and NCAs are to inform each

¹³⁵ Case C-338/95 *Wiener v Hauptzollamt Emmerich* [1997] ECR I-6495, at 18

¹³⁶ Case 283/81 *CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3415. *Acte éclairé* means it is not necessary to refer if a "materially identical" matter has already been decided by the Court of Justice. *Acte clair* means that the court does not need to refer if the answer to the question is "so obvious as to leave no scope for any reasonable doubt".

¹³⁷ ECN convergence survey as at 14 April 2008: 'ECN Working Group on Cooperation Issues - Results of the questionnaire on the reform of Member States' national competition laws after EC Regulation No. 1/2003.' p. 8, answer to Q13, available at http://ec.europa.eu/competition/ecn/ecn_convergencequest_April2008.pdf

¹³⁸ Document: 5158/01 Secretariat to delegations, 11.1.2001 (for: Germany, Denmark, Luxembourg, Austria, Sweden – but Denmark requests that in normal circumstances NCAs should represent the Commission in national court proceedings. Conversely Germany requests that NCAs submit observations independently and not as the representative of the Commission. Document: 8383/1/02 (Spanish) Presidency to COREPER, 27.5.2002: France requests that the Commission be authorized to make written observations to the national court only via the national competition authority.

¹³⁹ Commission Staff Working Paper: Reform of Regulation 17 – The proposal for a new implementing regulation – Article 15(3) submissions as *amicus curiae*, SEC (2001) 1827, 13.11.2001

other through the ECN if they intervene with an amicus brief in any case, indirectly linking national courts with the ECN.

In this way it could succeed in aligning national court decisional practice with that of national competition authorities linked through the ECN, minimising divergent application between public and private competition enforcers. The proposal to allow the binding effect of NCA infringement decisions throughout all Member States contained in the European Commission White Paper on damages actions, placing NCA decisions on a par with those of the Commission, could contribute to this effect. One criticism of the proposal, however, is that it implies a hierarchy of public enforcement over private enforcement in the courts.¹⁴⁰ This is discussed in the following chapter.

The implication of *Masterfoods*, and explicit in recital 13 of the notice on cooperation between the Commission and national courts, is that a court – even a lower court - *must* refer a question to the CJEU if it intends to take a decision counter to one taken by the Commission. In this way it imposes a stricter requirement than the discretionary reference under Article 267 TFEU – it elevates the discretionary reference of lower courts to a mandatory reference. Article 16 of Regulation 1/2003 codifies the *Masterfoods* ruling, that a national court or competition authority may not take a decision contrary to one already made or contemplated by the Commission. A national court may therefore decide to stay proceedings and refer a preliminary question to the ECJ. This is urged more strongly in the Courts notice, recital 13: “...if a national court intends to take a decision that runs counter to that of the Commission, it *must* refer a question to the Court of Justice for a preliminary ruling...”¹⁴¹

It remains to be seen whether national judges will make more use of Commission opinions as an alternative to preliminary references, or will use the two mechanisms concurrently as in the Spanish cases. As discussed above, a Commission opinion could become binding indirectly through the national court’s judgment if it transposes the Commission’s advice. This may be likely, for instance, where the judge is less experienced in competition law or at judging economic evidence, where the court is more willing to apply an interpretation

¹⁴⁰ See A Komninos “Public and Private Antitrust Enforcement in Europe: Complement? Overlap?” (2006) 3(1) *Competition Law Review* 5-26, 26, who opposes the proposal on the grounds that it would create a false hierarchy of public over private enforcement. Note too that NCAs are bound only by *existing* decisions of the Commission, not envisaged ones (article 16(2) of the Modernisation Regulation) – could this be evidence of a public over private enforcement hierarchy, or does it merely reflect the reality of structured cooperation within the ECN?

¹⁴¹ Ultimately, if the highest court does not refer the Member State could incur State liability - remedies in national courts: C-6/90 *Francovich and Others v Italian Republic* [1991] ECR I-5357; C-224/01 *Köbler v Austria* [2003] ECR I-10239

of Union law by a Union institution (albeit from the Commission rather than the CJEU), or for reasons of convenience – if the Commission’s ‘expert’ interpretation seems reasonable, there may be little incentive to look for an alternative. In addition, the national judge could use the opinion for interpretation of other, either national or EU, obligations or instruments. Whereas the judgment would be effective between the parties, a more universal effect could result if a principle expressed in a Commission opinion is then used in subsequent cases in the national case law.¹⁴²

5.1.2 Rights of the parties

In requesting a Commission opinion under Art 15(1), the national judge acts as a gatekeeper in the same way as s/he does when deciding whether to request a CJEU preliminary reference. That is, the interested party needs to persuade the judge of the need for such a request. Article 15 does not grant rights to individuals. This is evident from some national cases.

In *Brasseries Kronenbourg*,¹⁴³ a beer ties case, the bar tenant respondent, JBEG, requested that the proceedings be stayed to seek the Commission’s opinion on whether the cumulative effect of agreements in a national market amounts to an effect on trade between Member States; and whether the distribution agreement in question was covered by block exemption Regulation 2790/99. The judge refused the respondent’s request, on the basis that national courts are themselves empowered under Article 6 of Reg 1/2003 to apply EU competition rules.¹⁴⁴ Similarly in the Belgian *Lust/Daimler Chrysler* case, the claimant requested the Commercial Court to ask for the Commission’s assistance. The Court refused as the Commission had previously rejected a complaint from the claimant due to lack of Community interest.¹⁴⁵ In *Rutamar* the claimant requested a question to the Commission but the court did not think it necessary, citing similar cases of the Supreme

¹⁴² In the national context, the Dutch competition authority’s amicus curiae guidelines acknowledge that “The contents of these interventions are...of importance not only to the parties involved in the court proceedings...but also to other undertakings”: Nederlandse Mededingings Autoriteit Amicus Curiae Guidelines (2004), para[38]. Available at: http://www.nma.nl/images/Richtnoeren_Amicus_Curiae22-157243.pdf (last accessed 7.9.2012)

¹⁴³ Case 02/01205 *Brasseries Kronenbourg v SARL JBEG*, , Strasbourg Tribunal de Grand Instance (first instance civil court, commercial chamber), judgment of 4.2.2005.

¹⁴⁴ Supplement to Commission annual report 2005, p. 152-153

¹⁴⁵ Case n° A/03/1022, Decision n° 4646 *SPRL Lust automobiles and Paul Lust v. DaimlerChrysler AG Stuttgart and SA DaimlerChrysler Belgium Luxembourg* Tribunal de commerce de Mons (Commercial Court of Mons), judgment of 23.12.2004, See J Derenne & W Broere ‘The Belgium Commercial Court assesses the validity of an alleged anticompetitive car distribution agreement on the basis of Art. 81 EC and the EC block exemption regulation (*Daimler-Chrysler*)’ 23 December 2004, *e-Competitions*, N°30700, www.concurrences.com

Court on service station agency agreements. It also stated that, in any event, the Commission's criteria were not binding on the court.¹⁴⁶ Conversely, in a Belgian case on beer supply exclusivity agreements, the Antwerp Court of Appeal in an interim ruling invited the parties to adopt a position on requesting a Commission opinion under Art 15(1), suggesting that it was open to negotiation and that the parties' wishes were paramount.¹⁴⁷ The principle of equivalence with national law ironically means that parties' rights to be heard on European Commission interventions may vary across the Union.

5.2 Cases in which the Commission intervened at its own initiative: Art 15(3) Reg 1/2003

I also investigate cases where the Commission has intervened at its own initiative as *amicus curiae* under Art 15(3), and its reasons for doing so. Table 2 below summarises the nine cases.¹⁴⁸ The reasons for intervening and the impact of the judgment in some of the cases are analysed in more detail below.

¹⁴⁶ Spanish annual report 2005, p. 143: Case 578/2003 *Rutamur, SA v Repsol Comercial de Productos Petroliferos SA*, Audiencia Provincial de Madrid (secc. n° 21), 5.7.2005 - appeal against the sentence of the Court of 1st Instance n° 26, Madrid

¹⁴⁷ DG COMP report 'Overview of the application of the EC competition rules by national courts in 2006', 2. Available at <http://ec.europa.eu/comm/competition/elojade/antitrust/nationalcourts/Overview+of+the+application+of+the+EC+competition+rules.pdf> (accessed 23.2.2009)

¹⁴⁸ This number of own-initiative interventions is confirmed in the 2011 Annual Report on Competition Policy, p. 15

TABLE 2: European Commission own-initiative interventions in national court proceedings under Art 15(3) Regulation 1/2003

Case name	Member State	Court	Sector	Facts/context	Commission intervention and reasons	Commission intervention; judgment delivered
1. Garage Grémeau v Daimler Chrysler 188/07; file number 05/17909 ¹⁴⁹	France	Paris Court of Appeal (Cour d'Appel)	Car dealerships (distribution)	Vertical distribution agreements Daimler Chrysler France's refusal to renew an agreement with Grémeau, a car dealer. Court of Appeal did not rule on the merits but suspended the case pending criminal proceedings brought by Daimler Chrysler against Garage Grémeau for forgery and fraud.	Oral as well as written observations. To influence whether injunction to be granted (while stressing national procedural autonomy...). Potential erroneous interpretation of quantitative selective distribution scheme by the commercial chamber of the French Supreme Court (Cour de Cassation) earlier (28.6.2005) in the case, on appeal from the Cour d'appel de Dijon - requiring suppliers to apply	2.11.2006 (Com intervention) 7.6.2007 (Court judgment)

¹⁴⁹ Commission annual report 2006, p. 33 (unnamed); SWP SEC (2007) 860, 25.7.2007 Available at http://ec.europa.eu/competition/publications/annual_report/2006/part2_en.pdf (accessed 3.8.2010), (which includes annual report p. 124-125 (unnamed); FIDE 2008 France country report, p. 101, FIDE institutional 2008 report p. 468; Commission staff working paper SEC (2009) 574 accompanying Commission report on the functioning of Regulation 1/2003, COM (2009) 206 final, p. 81-82; see case notes by J Philippe and F Kramer in *e-Competitions*, October 2007-II; and N Lenoir, D Roskis and Ch M Doremus in *e-Competitions* December 2007-I for a fuller discussion of the case; interlocutory court judgment 7.6.2007 available in DG COMP national court judgments database at http://ec.europa.eu/competition/antitrust/national_courts/court_2007_20_fr.pdf (accessed 16.8.2010); Dijon Court of Appeal case mentioned in Commission annual report supplement 2005: application of the EC competition rules by Member States, p.57

Case name	Member State	Court	Sector	Facts/context	Commission intervention and reasons	Commission intervention; judgment delivered
					objective criteria for selection of dealers even where they use only a quantitative, as opposed to qualitative, selection system. Qualitative and quantitative selective distribution in the framework of the new block exemption regulation 1400/2002	
2. Pierre Fabré Dermo-Cosmétique 08-D-25 RG 2008/23812150	France	Paris Court of Appeal (Cour d'Appel)	Selective distribution agreements - internet sales of cosmetics	French competition authority had found that the cosmetic manufacturer's practice of banning its distributors from selling over the internet in its selective distribution agreements breached Article 101 TFEU and the French provisions. Context of appeal.	Commission supported French NCA that the conduct amounted to a hardcore restriction within the meaning of block exemption regulation, unless objectively justified by exceptional circumstances. However, the Commission also	11.6.2009 (Com intervention) 29.10.2009 (court judgment) Paris Court referred to CJEU after Com's intervention Prelim ruling to CJEU, C-439/09

¹⁵⁰ Commission annual report 2009, p. 120; FIDE 2010 institutional report p. 42-4; L Ferchiche, 'A French Court of Appeal makes a reference for a preliminary ruling to the ECJ on whether a general and absolute ban on Internet sales by approved distributors does constitute a "hardcore restriction" on competition by object within the meaning of Art. 81.1 EC (*Pierre Fabre Dermo-Cosmétique*)', 29 October 2009, *e-Competitions*, n°29700; ECN brief 1/2010, pp. 17-18

Case name	Member State	Court	Sector	Facts/context	Commission intervention and reasons	Commission intervention; judgment delivered
					opined that although it was a hardcore restriction by object, it may still be possible to qualify for exemption under Article 101(3)	lodged on 10.11.2009 and delivered 13.10.2011. Com brief mentioned at [30]. CJEU's conclusion was in line with the Commission's.
3. X BV v Inspecteur Belastingdienst 06/00252, LJN BB3356 (First instance in Haarlem District Court, 22.5.2006, AWB 05/1452, LJN AX7112) 08/01180, LJN: BL7052 ¹⁵¹	Netherlands	Amsterdam Court of Appeal (first instance in Haarlem District Court Rechtbank) Gerechtshof Amsterdam.	Tax	Whether fines imposed for breach of EU competition law tax deductible from profits. In domestic tax, punitive and benefit-depriving elements of a fine.	To safeguard effectiveness and deterrence of fines Preliminary reference: whether the Commission can intervene with Article 15(3) observations <i>only</i> where the national case involves <i>direct</i> application of Article 101 and 102 TFEU.	Intervention attempted 12.9.2007. 24.9.2009 (Com intervention date claimed on website. This could relate to when the intervention was finally accepted following preliminary reference.) Preliminary ref

¹⁵¹ www.rechtspraak.nl Dutch court judgments database; FIDE Netherlands report 2008, p. 217, FIDE 2008 institutional report, p. 468, 470; FIDE 2010 institutional report (A Bouquet 'Institutional Report' in G C Rodriguez Iglesias & L Ortiz Blanco (eds) *The Judicial Application of Competition Law: Proceedings of the FIDE XXIV Congress Madrid 2010 Vol 2* (Servicio de Publicaciones de la Facultad de Derecho, Complutense University, Madrid 2010) p. 42-43, Staff working paper on 2009 Commission report functioning of Reg 1/2003, p. 82-83; Commission annual report 2009, p. 40-41, 120; ECN brief 2/2010, p. 15-16; Commission annual report 2010 para [147] re intervention in Supreme Court

Case name	Member State	Court	Sector	Facts/context	Commission intervention and reasons	Commission intervention; judgment delivered
						<p>to CJEU C-429/07 8.12.2007; CJEU ruling 11.6.2009.¹⁵²</p> <p>Judgment delivered in Amsterdam Court of Appeal 11.3.2010 in line with Com opinion as to result, but it is not explicitly mentioned - Art.3.14. of the Income Tax Act 2001 does not allow a distinction between deductible and non-deductible punitive and benefit-depriving portions. Therefore fines</p>

¹⁵² C-429/07 *Inspecteur van de Belastingdienst v X BV* [2009] 5 CMLR 1745 (not yet reported in ECR)

Case name	Member State	Court	Sector	Facts/context	Commission intervention and reasons	Commission intervention; judgment delivered
						imposed by the Commission for a cartel law infringement are not deductible from taxes in domestic law. But 4.3.2 “no matter whether it is a fine from the European Commission or the Dutch competition authority”..
4. X BV (see above) 10/01358, LJN: B06770 Hoge Raad ¹⁵³		Dutch Supreme Court (Hoge Raad) post-preliminary reference in the Amsterdam Appeal Court		See above	See above Ensuring Court of Appeal’s judgment not overturned ¹⁵⁴	16.12.2010 (Com intervention) 12.8.2011 (Supreme Court judgment – appeal unfounded)
5. Beef Industry Development Society Competition Authority -v- Beef Industry Development Society Ltd	Ireland	Irish High Court	Beef	Agreement among beef processors in Ireland to reduce capacity by 25% (by getting some processors to leave market in return for payment). Previous prelim ref	Ensuring High Court followed CJEU’s preliminary ruling re whether 101(3) satisfied. ¹⁵⁶	C-209/07 Beef Industry Development Society and Barry Brothers

¹⁵³ Available at www.rechtspraak.nl Opinion of A-G Wattel 16.11.2010. Final judgment 12.8.2011 (published 18.4.2012)

¹⁵⁴ Commission Staff Working Paper Accompanying the Report from the Commission on Competition Policy 2010 {COM(2011) 328 final} SEC(2011) 690 final Brussels 10.6.2011, p. 409

Case name	Member State	Court	Sector	Facts/context	Commission intervention and reasons	Commission intervention; judgment delivered
& Another [2006] IEHC 294 (27 July 2006) ¹⁵⁵				from Irish Supreme Court to CJEU in March 2007, prelim ruling in Nov 2008 confirmed was an object agreement. Irish Supreme Court therefore found breach of Art 101(1) in Nov 2009, remitted to High Court to consider whether Art 101(3) satisfied.	CJEU case law Commission's 2004 Guidelines on the application of Article 101(3) TFEU.	[2008] ECR I-8637, judgment 20.11.2008. 30.3.2010 (Com intervention) Case in Irish High Court withdrawn by NCA after BIDS withdrawn its claim for exemption on efficiency grounds under 101(3) in Jan 2011.
6. ZS Cargo Železničná spoločnosť Cargo Slovakia, a.s. ¹⁵⁷	Slovakia	Najvyšší súd Slovenskej Republiky (Slovakian Supreme Court)	Rail transport	Art 102. Economic succession and effectiveness of fines.	To ensure effectiveness of fines and principle of economic succession – liability. Punishment and deterrence. No	25.6.2010 (Com intervention) 20.10.2010 27.2.2012? (Court judgment)

¹⁵⁶ Commission annual report 2010 staff working paper, p. 405

¹⁵⁵ 2010 annual report para 147; SWP 2010 annual report p. 108, para 405; FIDE 2010 institutional report, p. 42-43; ECN brief 2/2010 announcing the Commission's intention to intervene, p. 16; FIDE 2008 Ireland country report, p. 183-185 on the Competition Authority's original case before the Irish High Court.

¹⁵⁷ Commission annual report 2010 para 147; staff working paper 2010, p. 108-9, paras 406-408; FIDE 2010 institutional report p. 42. On the Commission's intervention: ECN brief 05/2010 available at http://ec.europa.eu/competition/ecn/brief/05_2010/sk_cargo.pdf (accessed 14.1.2010). On the Supreme Court's judgment: ECN brief 02/2012 available at http://ec.europa.eu/competition/ecn/brief/02_2012/sk_cargo.pdf (accessed 26.6.2012). Slovak NCA annual report 2010 p. 25-26. <http://www.antimon.gov.sk/files/26/2011/Vs%20PMU%20SR%202010.pdf> (accessed 30.7.2011)

Case name	Member State	Court	Sector	Facts/context	Commission intervention and reasons	Commission intervention; judgment delivered
					reduction of fine purely because firm is successor company to one which committed the infringement Supreme Court annulled decision of Regional Court, upheld fine imposed by the Slovak Antimonopoly Office	Supreme Court followed Com's arguments
7. Orange Caraïbe ¹⁵⁸	France	Cour de Cassation (French Supreme Court)	Mobile telephony	Practices by France Telecom and affiliate Orange Caraïbe in French overseas territories in Caribbean. French NCA fined them for breach of Art 101 and 102 TFEU. Paris Court of Appeal ruled no effect on trade between Member States and annulled.	Com intervened to support French NCA's fine, to safeguard EU jurisdiction – national court defining 'effect on trade between Member States' narrowly. Com referred to its guidelines on effect on trade concept, particularly parts on how principle applies when practices affect only part of a Member	13.10.2011 (Com intervention) 31.1.2011 (court judgment) Supreme Court followed Com's interpretation Annulled decision of the Paris Appeal Court and sent back to the Court for a second review

¹⁵⁸ Commission Staff Working Paper Accompanying the Report from the Commission on Competition Policy 2011 {COM(2012) 253 final}, Brussels, 30.5.2012 SWD(2012) 141 final, p. 15, fn 48 – not identified in the annual report http://ec.europa.eu/competition/publications/annual_report/2011/part2_en.pdf (accessed 26.6.2012). The case is identified at http://ec.europa.eu/competition/court/antitrust_amicus_curiae.html.

Case name	Member State	Court	Sector	Facts/context	Commission intervention and reasons	Commission intervention; judgment delivered
					State.	
8. National Grid Electricity Transmission Plc v ABB Ltd and other companies [2011] EWHC 1717 (Ch) ¹⁵⁹	United Kingdom	High Court	Energy	In the context of a damages action brought by National Grid, UK utility company against a number of companies (ABB, Siemens, Alstom and Areva) that were held liable by the Commission in 2007 for their participation in the Gas Insulated Switchgear (GIS) cartel. National Grid sought access to information from those companies' leniency applications to the Commission to assist in its damages claim against them. Aftermath of CJEU's preliminary reference in C-360/09 Pfeleiderer, in which it ruled it was up to national courts to decide whether leniency documents should be disclosed in the context of damages claims by private parties, balancing the rights of damages claimants and leniency applicants.	Intervened to safeguard leniency programme. Com stated that the weighing of the different interests implied that the information specifically prepared for the purpose of an application under its leniency programme should not be disclosed.	3.11.2011 (Com intervention) 4.4.2012 (court judgment) High Court at [39] applied a proportionality test asking (a) whether the info could be obtained from other sources and (b) relevance of leniency materials to the case as info could not be gained elsewhere it allowed disclosure of a limited part of the confidential version of the Commission

¹⁵⁹ Staff working paper on annual report 2011, p. 15, fn 49 – not identified in the annual report http://ec.europa.eu/competition/publications/annual_report/2011/part2_en.pdf (accessed 26.6.2012). The case is identified at http://ec.europa.eu/competition/court/antitrust_amicus_curiae.html.

Case name	Member State	Court	Sector	Facts/context	Commission intervention and reasons	Commission intervention; judgment delivered
						decision. Therefore did not entirely follow Commission's opinion.
9. Unknown ¹⁶⁰	Austria	unknown	unknown	unknown	Parallel application of EU and national law: "In its observations, the Commission argued that the effective enforcement of Article 101 TFEU would be hindered if a judgment would have as its subject matter solely national law and be entirely silent on the (non)-applicability of EU law, as this could be deemed as an assurance for undertakings that a cartel does not infringe Article 101(1) TFEU"	2011

¹⁶⁰ Staff working paper on annual report 2011, p. 15 fn 47 – not identified http://ec.europa.eu/competition/publications/annual_report/2011/part2_en.pdf (accessed 26.6.2012)

5.2.1 *Reasons for intervening*

Art 15(3) empowers the Commission to intervene “where the coherent application of Article [101] or [102 TFEU] so requires”. In *X BV*, discussed in detail below, ‘coherent’ was construed broadly to mean effective application. Under this umbrella of effectiveness, there were various reasons for intervening in the case identified in Table 2.

A number of *amicus curiae* submissions so far have been related to block or individual exemptions which, pre-reform, would have been in the sole jurisdiction of the Commission. *Garage Grémeau* in the Paris Court of Appeal was the first case in which the Commission intervened under Art 15(3), with oral as well as written observations. It concerned vertical agreements in the car sector, and Daimler Chrysler’s refusal to renew its distribution deal with Garage Grémeau. The Commission appears to have intervened to influence whether or not an injunction should be granted (whilst stressing national procedural autonomy). It centred on the French Supreme Court’s earlier interpretation of the quantitative selective distribution scheme.¹⁶¹ It seems the Commission took this as an important opportunity to step in to clarify and safeguard the uniform interpretation of block exemptions in the car sector following the decentralisation of Article 101(3). As its 2006 Annual Report on Competition suggests, the Commission’s goal was also to *encourage* a preliminary reference to the CJEU for a binding ruling.¹⁶²

In *National Grid* in the English High Court the Commission intervened to safeguard its leniency programme. This was in the context of a damages action brought by National Grid against a number of companies (ABB, Siemens, Alstom and Areva) that were held liable by the Commission in 2007 for their participation in the Gas Insulated Switchgear (GIS) cartel. The claimant was seeking access to leniency documents. The CJEU had ruled in the *Pfleiderer*¹⁶³ case shortly beforehand that it was up to national courts to decide whether leniency documents should be disclosed in the context of damages claims by private parties, balancing the rights of damages claimants and leniency applicants. There was general alarm that this would jeopardise competition enforcement by discouraging cartel members from blowing the whistle on each other to a competition authority if they are then going to be liable for damages in a private action. The Commission said in its *amicus curiae* observation that the weighing of the different interests implied that the

¹⁶¹ See case notes by J Philippe and F. Kramer in *e-Competitions*, October 2007-II; and N Lenoir, D Roskis and Ch M Doremus in *e-Competitions* December 2007-I for a fuller discussion of the case

¹⁶² Annual Report on Competition Policy 2006 Commission Staff Working Document, SEC (2007) 860, 25.7.2007, 90. Available at http://ec.europa.eu/competition/publications/annual_report/2006/part2_en.pdf (accessed 3.8.2010)

¹⁶³ C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-0000

information specifically prepared for the purpose of an application under its leniency programme should not be disclosed.

In *Orange Caraïbe*, concerning mobile telephony in French overseas territories, the Commission intervened to safeguard EU jurisdiction. The Paris Court of Appeal had overturned the fine of the French competition authority for breach of Arts 101 and 102 TFEU. The national court defined ‘effect on trade between Member States’ narrowly, meaning it would apply only to national competition law.

The Irish *Beef Industry Development Society (BIDS)* case¹⁶⁴ concerned an agreement among the principal beef processors in Ireland to reduce processing capacity by 25% to safeguard the industry. The Irish Supreme Court had previously submitted a preliminary reference to the CJEU¹⁶⁵. The CJEU found it was an object agreement and the case was then remitted to the Irish High Court in the context of public enforcement proceedings to determine whether Art 101(3) TFEU applied. The Commission intervened in the High Court to ensure that the preliminary ruling was followed. As with *Garage Grémeau* above, this shows the potential for a complementary relationship between the preliminary reference procedure and Commission interventions. On the other hand, it is questionable to what extent national judges would need further help from the Commission to ‘interpret’ the CJEU’s ruling. This also happened in *X BV* – the Commission intervened again in the Dutch Supreme Court to ensure that the CJEU’s ruling, and its previous intervention in the Amsterdam Appeal Court was followed.

In *Pierre Fabre*, the Commission intervened in support of the French competition authority’s finding that internet sales bans in selective distribution agreements breached Article 101 TFEU and the French provisions.¹⁶⁶ In this way the Commission attempted to influence the substantive law, as well as showing the strength in numbers of the European Competition Network. The French court submitted a preliminary reference to the CJEU *after* the Commission’s intervention. It did so precisely because of the non-binding nature of the Commission’s observations under 15(3) and its guidelines.¹⁶⁷ In at least one

¹⁶⁴ *Competition Authority -v- Beef Industry Development Society Ltd & Anor* [2006] IEHC 294 (27 July 2006)

¹⁶⁵ Case C-209/07 *Beef Industry Development Society and Barry Brothers* [2008] ECR -8637, judgment 20.11.2008

¹⁶⁶ Case 08-D-25 RG 2008/23812, *Pierre Fabre Dermo-Cosmétique* Paris Court of Appeal, 29 Oct 2009

¹⁶⁷ C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v Président de l’Autorité de la concurrence, Ministre de l’Économie, de l’Industrie et de l’Emploi*, judgment of the CJEU 13.10.2011, not yet reported, at [30]

Spanish case the court sought both the Commission's opinion and the CJEU's preliminary ruling.¹⁶⁸

5.2.2 *Impact of the intervention in the judicial proceedings*

In *National Grid*, the Commission said in its *amicus curiae* observation that the weighing of the different interests implied that the information specifically prepared for the purpose of an application under its leniency programme should not be disclosed. The judge in the High Court took a more nuanced approach, applying a proportionality test asking (a) whether the information could be obtained from other sources and (b) the relevance of leniency materials to the case [para 39]. As information could not be obtained from another source, he allowed disclosure of a limited part of the confidential version of the Commission decision¹⁶⁹. Therefore the judge did not entirely follow the Commission's opinion.

In *Orange Caraïbe*, the French Supreme Court followed the interpretation on effect on trade between Member States put forward by the Commission. It annulled the decision of the Paris Appeal Court and sent it back to the Court for a second review.

In the Irish Beef Industry case, it is not possible to judge the effect of the Commission's intervention as the case in the Irish High Court was withdrawn after the agreement was broken up and the Beef Industry Development Society discontinued its claim for exemption under Art 101(3). Similarly, in *Garage Grémeau* the court did not rule on the merits but suspended pending criminal proceedings brought by Daimler Chrysler against Garage Grémeau for forgery and fraud.

5.3 'Invitations' from the court to submit observations

In practice, there have been instances of Member State courts 'inviting' the Commission to submit a written intervention in the proceedings, which, conceptually, falls between the two categories of Article 15(1) and Article 15(3). In *National Grid*,¹⁷⁰ the Commission was

¹⁶⁸ C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA* (CEEES v CEPSA) [2006] ECR I-11987. Referred to in the Spanish NCA annual report 2007, 214

¹⁶⁹ *National Grid Electricity Transmission Plc v ABB Ltd and other companies* [2011] EWHC 1717 (Ch)

¹⁷⁰ http://ec.europa.eu/competition/court/amicus_curiae_2011_national_grid_en.pdf :

responding to the English High Court's invitation to submit observations – but this was still categorised as a 15(3) own initiative intervention, presumably as the domestic court did not ask specific questions. As reported in the Belgian competition authority's annual report, the Commission was similarly invited to offer observations in two Belgian cases, *Power Oil* and *Courtraisy*,¹⁷¹ but did not take up the opportunity to do so. The Belgian authority suggested this was in line with Art 15(3), as it was not an explicit request for advice on the rules of Community competition law within the meaning of Article 15(1) Reg 1/2003.¹⁷² Other examples include the Dutch *Mosselcultuur* case;¹⁷³ and *Mastercard v OFT* in the UK.¹⁷⁴

At the other end of the scale, some courts have been resistant to Art 15(3) interventions. One such example is the *X BV* case, the first in which a national court, in the Netherlands, asked the CJEU to rule on the competence of the European Commission to intervene and addresses important questions about the nature of this mechanism. As such, this case merits further investigation.

6. Admissibility and scope of the European Commission's own-initiative Art 15(3) interventions in national competition cases: the preliminary reference in *X BV*¹⁷⁵

*Inspecteur van de Belastingdienst v X BV*¹⁷⁶ is ostensibly a tax case rather than a direct Article 101/102 TFEU case, which is why the Commission's competence to intervene under Regulation 1/2003 was questioned by the Dutch court. It tests the substantive scope for

whether national court has jurisdiction to order disclosure of leniency documents submitted to the Commission

¹⁷¹ Annual Report of the Belgian Competition Council 2005: http://economie.fgov.be/fr/binaries/report_competition_2005_fr_tcm326-36151.pdf (accessed 11.8.2010), 55-56. *Power Oil SA/D.D. Invest SA*, Case R.G. 2003/AR/1444, 7.3.2006; *Compagnie Pétrolière du Courtraisy SA/Maurice Coene*. Case R.G. 2004/MR/9, 7.3.2006. Both were in Brussels Court of Appeal, in the context of preliminary questions from lower court judges.

¹⁷² Annual Report of the Belgian Competition Council 2005, 55: "Dans ces deux affaires, la Cour avait également offert à la Commission européenne la possibilité de formuler des observations écrites, ce qui ne semblait constituer guère plus que la possibilité offerte à la Commission par l'article 15, alinéa 3 du Règlement 1/2003 de soumettre d'office des observations écrites, et ce qui n'était, dès lors, pas une demande explicite d'avis au sujet des règles communautaires du droit de la concurrence, au sens de l'article 15, alinéa 1 du Règlement 1/2003. La Commission n'a pas pris d'initiative allant dans ce sens."

¹⁷³ FIDE 2008 Netherlands country report, 216

¹⁷⁴ The Competition Appeal Tribunal (CAT) contacted the Commission to ask whether it wished to make any observations on the appeal issues given its 2002 Visa International – Multilateral Interchange Fee decision OJ [2002] L 318/17 (FIDE 2008 UK country report, 367).

¹⁷⁵ A more detailed version of this section was published as K Wright 'European Commission Interventions as Amicus Curiae in National Competition Cases: the Preliminary Reference in *X BV*' (2009) 30 (7) *European Competition Law Review* 309-313

¹⁷⁶ Case C-429/07 *Inspecteur van de Belastingdienst/P/kantoor P v X BV*, reference OJ C 297, 8.12.2007, 23, opinion of Advocate General Mengozzi of 5.3.2009, CJEU preliminary ruling delivered 11.6.2009, 5 CMLR 12 not yet reported in ECR

Commission observations as *amicus curiae* under Article 15 of the Regulation. The CJEU ultimately ruled that a Member State court was required to accept the Commission's own-initiative written observation. The CJEU's ruling gives the European Commission scope to intervene in national court proceedings not only when the judge is actually applying Articles 101 and 102 TFEU, but also where proceedings in some way link to the effective application of those Articles. First, the case suggests an emphasis on effective (rather than just coherent) application of the EU rules over judicial independence. Second, it allows the Commission to intervene, for example, in follow-on damages cases and in criminal prosecutions in national courts. Arguably this extended competence was never intended by the Regulation.

The issue was whether fines for breach of the competition rules are tax deductible. The case was linked to the plasterboard cartel investigation, in which the Commission imposed fines (based on Article 103(2) TFEU) on various firms for breach of Article 101 TFEU.¹⁷⁷ One of those firms (anonymised as X KG) had its fine partially paid by one of its affiliates (X BV). The dispute came about in 2004 when the Dutch tax inspectorate imposed a tax demand on X BV, which tried to have the Commission fine deducted from its taxable income. The Haarlem District Court (*Rechtbank*) considered that the EU concept of a 'fine' differs from the national law concept because the fine imposed on X KG, unlike fines imposed by national law, consisted of punitive as well as benefit-depriving elements. National proceedings arose as under Dutch tax law a fine imposed by an EC institution on a firm may not be deducted from the firm's taxable income.¹⁷⁸ Without going into the intricacies of Dutch tax law here, the District Court ruled in favour of X BV.¹⁷⁹

The Dutch tax inspectorate appealed to the Amsterdam Court of Appeal (*Gerechtshof*).¹⁸⁰ The European Commission indicated that it wished to submit written observations under Article 15(3) and requested case documents so that it could do so, on the basis that the case concerned the character of a Community fine. The Commission was careful to specify that its wish to submit observations was not about substantive tax law and national provisions; it was not concerned with whether the deduction of the amount of a fine from a company's taxable profit was contrary to European law.

¹⁷⁷ Commission Decision 2005/471/EC of 27 November 2002 relating to proceedings under Article 81 of the EC Treaty against BPB PLC, Gebrüder Knauf Westdeutsche Gipswerke KG, Société Lafarge SA and Gyproc Benelux NV (Case No COMP/E-1/37.152 — Plasterboard), O J L 166, 8

¹⁷⁸ Article 3.14(c) Dutch Income Tax Act 2001

¹⁷⁹ Case AWB 05/1452, LJN AX7112, judgment of 22.5.2006

¹⁸⁰ Case 06/00252, LJN BB3356

In considering whether it should send documents to the Commission to allow it to intervene, the *Gerechtshof* did not have the impression that the Council of Ministers had this type of case in mind when it enacted Regulation 1/2003, but rather that the Council envisaged cases where Article 101 and 102 were directly applied: “real competition cases”.¹⁸¹

In its deliberations the *Gerechtshof* considered recital 21 of Regulation 1/2003 and recitals 31 & 35 of the Courts notice. The court noted that recital 21 and recital 31 of the Courts notice refer to submissions to national courts “called upon to apply Article [101 or 102] of the Treaty”; whereas Article 15(3) itself appears to have broader scope, stating that the Member State competition authorities may submit observations on “issues relating to the application of Articles [101 and 102] of the Treaty”, and the Commission may submit observations “where the coherent application of Article [101] or Article [102] of the Treaty so requires”. “[R]elating to...” in Article 15(3) suggested that it had wider range than genuine competition cases.¹⁸² The *Gerechtshof* also noted that there does not appear to be an intentional difference in scope between Article 15(1), covering requests from a national court to the Commission for the transmission of information or for an opinion on ‘questions concerning the application of the Community competition rules’, and Article 15(3) providing for Commission intervention through *amicus curiae* briefs on “*issues relating to the application of Articles [101 and 102] of the Treaty.*”¹⁸³ To complicate matters, the Explanatory Memorandum to the Dutch Competition Act,¹⁸⁴ Article 3.4, interprets Art 15(1) as “questions relating to the application of Articles [101] and [102] of the EC Treaty’ rather than just the ‘competition rules’ (“...over de toepassing van de artikelen [10]1 en [102]...”); it does not transpose the wording of Article 15 directly.

However, the court observed that recital 31 of the Courts notice is not particularly ambiguous, incorporating both of the above ideas: “...may submit observations on *issues relating to the application of Article [101] or [102]* to a national court which is *called upon to apply those provisions*”.¹⁸⁵ In addition, the Dutch version of recital 21 of the Modernisation Regulation could be interpreted to mean “*when called upon to apply*

¹⁸¹ At 2.5.1 of the *Gerechtshof* judgment of 12.9.2007

¹⁸² *Gerechtshof*, at 2.5.3

¹⁸³ *Gerechtshof*, at 2.5.4

¹⁸⁴ Wijziging van de Mededingingswet en van enige andere wetten in verband met de implementatie van EG-verordening 1/2003: Memorie van Toelichting (wet van 30 juni 2004, Stb. 345, Kamerstukken II, vergaderjaar 2003-4, 29276, nr 3)

¹⁸⁵ The Dutch version of recital 31 of the Courts notice reads: „Overeenkomstig artikel 15, lid 3, van de verordening kunnen de nationale mededingingsautoriteiten en de Commissie voor de nationale rechterlijke instanties die de artikelen 81 en 82 van het Verdrag moeten toepassen, opmerkingen maken betreffende onderwerpen in verband met de toepassing van deze bepalingen.“

Articles [101 and [102]”, which could arguably require courts to be applying Article 101 or 102 in the specific case at hand for the Commission to be competent to intervene.¹⁸⁶

The Amsterdam Court of Appeal¹⁸⁷ considered that, on the one hand, these recitals could suggest that Article 15(3) was only applicable in cases involving a national court’s direct application of Articles 101 and 102, whereas the current case centred on the application of Dutch domestic tax law, only indirectly touching on the EU antitrust provisions. On the other hand, it considered that the duty of loyal co-operation between the Commission and the Member States arising from Article 10EC (now Art 4(3) TEU) and the principle of effectiveness, explicitly mentioned in recital 35 of the Courts notice,¹⁸⁸ suggest that the scope for Commission intervention could be interpreted more widely than the application of Articles 101 and 102. It also needed to be taken into consideration that the provisions of Article 15(1) and (3) Regulation 1/2003 signalled a change in the distribution of competences of the EU and national authorities.¹⁸⁹ Furthermore, the exercise of the Commission’s competence to intervene as *amicus curiae* could lead to an infringement of the general principle of procedural equality of the parties.¹⁹⁰ Taking this with the ambiguous nature of Article 15(3), the Amsterdam Court decided to stay proceedings and referred to the CJEU for a preliminary ruling.¹⁹¹

Concurring with the Advocate General’s view,¹⁹² in its judgment the CJEU confirmed the “intrinsic link between fines and application of Articles [101 and 102 TFEU] ” – and that “to disassociate the principle of prohibition of anti-competitive practices from the penalties provided would deprive the action of the authorities of its effectiveness.”¹⁹³

¹⁸⁶ “Anderzijds moeten de Commissie en de mededingingsautoriteiten van de lidstaten de bevoegdheid hebben schriftelijke of mondelinge opmerkingen voor de nationale rechterlijke instanties te maken, wanneer hun verzocht wordt artikel 81 of artikel 82 van het Verdrag toe te passen.”

¹⁸⁷ Case 06/00252, LJN BB3356, judgment of 12.9.2007

¹⁸⁸ Commission Notice of 27 April 2004 on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, OJ C 101, 27.04.2004, 54-64

¹⁸⁹ Gerechtshof at 2.6.3

¹⁹⁰ Gerechtshof, at 2.7

¹⁹¹ “Is the Commission competent, under Article 15(3) of Regulation No 1/2003, to submit, on its own initiative, written observations in proceedings relating to the deductibility from the (taxable) profit realised by the party concerned in 2002 of a fine for infringement of Community competition law, which was imposed by the Commission on X KG [a firm] and (partially) passed on to the party concerned?”

¹⁹² A-G’s opinion [38]

¹⁹³ Judgment at [36]

6.1 'Effective', 'coherent', 'consistent' or 'uniform' application?

In X BV, the Advocate General addressed the meaning of coherent application in decentralised enforcement. Although the text of Article 15 does not mention *effective* application, the Advocate General nevertheless raised the general principle of effectiveness and linked it to coherence. He noted that Article 15(3) refers to 'coherent application' of Articles 101 and 102, and not only to their interpretation. Since application suggests a result being attained, this would mean that not only the *coherent application* of those articles, but their *effective* application could be at risk. In linking the two, he went on to discuss the concepts of internal and external coherence. Internal coherence would relate simply to the consistent application of the conditions of Articles 101 and 102, whereas external coherence would imply that these provisions should have a logical and intelligible place in the more general framework of the system of EU competition rules or the Treaty, also referred to as 'global' system coherence.¹⁹⁴

The Advocate General's opinion then dealt with the distinction between 'uniform' and 'coherent'/'consistent' application. Whereas 'consistency' allows for different degrees, he considered that 'uniformity' does not accommodate this. Different language versions of Regulation 1/2003 use both terms, 'uniform' and 'coherent', apparently interchangeably. The concept of coherence would be flexible enough for a broad interpretation of Article 15(3) encompassing situations where a national court would compromise or would be likely to compromise the *uniform*, or even *effective* application of Articles 101 and 102 TFEU. The broad interpretation approach seemed to the Advocate General to be all the more appropriate given that the objectives of the Regulation are, in his view, to provide for *uniform* and effective application in the context of the Commission's central supervisory responsibility conferred on it by EU law.¹⁹⁵ This seems to be the case even in a system of concurrent competences to enforce the rules. In an interesting expression in the context of partnership in the European Competition Network, the Court referred to the Commission as "*the* Community competition authority"¹⁹⁶ (emphasis added), underlining its position as first among equals.

¹⁹⁴ A-G's opinion [26]-[28]. The Advocate General referred to academic literature by N MacCormick, Amaya Navarro, and Berteia in support: N MacCormick 'Coherence in Legal Justification' in A Peczenik (ed) *Theory of Legal Science* (Reidel, 1984) 235). "They also, as a rule, distinguish between local systemic coherence and global systemic coherence, the former referring to a situation in which only certain areas of a legal system are coherently interlinked, the latter referring to the logical and intelligible interaction of all areas of the system: see, on this point, A Amaya Navarro *An Inquiry into the Nature of Coherence and its Role in Legal Argument*, Doctoral Thesis, European University Institute, Florence, 2006, in particular pp. 35 to 37, and S Berteia 'Looking for Coherence within the European Community' (2005) (2) *European Law Journal* 157

¹⁹⁵ Opinion at [34]

¹⁹⁶ Judgment at [39]

Although Article 15(3) only refers to Article 101 and 102, an approach to Commission observations excluding other provisions of Community law, including Article 103(2)(a) EC upon which fines are based, would be inappropriate given that Article 103 is a means for the Commission to ensure compliance with Article 101 and allows it to carry out its supervisory task.¹⁹⁷ While Article 15 is *primarily* envisaged to be activated when national courts are called upon to rule on the application of Article 101 and/or 102, this should be considered in the context of the decentralised enforcement regime ushered in by Regulation 1/2003.¹⁹⁸ It would be artificial to say that despite the intrinsic link that fines have with the application of Articles 101 and 102 TFEU, a dispute of national law raising a question concerning the nature of fines imposed by a Commission decision adopted to ensure compliance with the prohibition of Article 101(1) TFEU cannot *a priori* be likely to affect the coherent application of that Article.¹⁹⁹ In interpreting and applying Articles 101 and 102, the national court needs to have regard not only to the CJEU's interpretation of these provisions, but *also to the decisional practice of the Commission*, unless the national court considered that practice to be illegal.²⁰⁰

The Advocate General compared the wording of Article 15(3) with related provisions on the cooperation between the Commission and national courts. As mentioned above, Article 15(1) allows for national courts to ask the Commission for information or its opinion concerning the application of Community competition rules “in proceedings for the application of Article [101] or [102]” [the *Gerechtshof* focused on the ‘application of Community rules’ part of this clause]. Under 15(2), Member States should forward to the Commission a copy of any written judgment ‘deciding on the application of Article [101] or [102]’. However, Article 15(3) only refers to ‘coherent application’. Like the *Gerechtshof*, the Advocate General also noted that recital 21 of the Regulation does not use precisely the same wording as 15(3).²⁰¹ He drew attention to the imprecise drafting of Article 15(3) in terms of written and oral observations and the circumstances in which the Commission and national competition authorities may make them. National competition authorities may submit observations on ‘issues relating to the application of Article [101] or [102]’, but it is not clear whether this also applies to the Commission, or whether the latter may only make observations where coherent application requires it. This imprecision led him to conclude that the words cannot be imbued with a rigid definition,²⁰² and recital 21

¹⁹⁷ opinion at [37]

¹⁹⁸ opinion at [40]

¹⁹⁹ opinion at [38], [42]

²⁰⁰ opinion at [35]

²⁰¹ opinion at [43]

²⁰² opinion at [45]-[46]

cannot be used to limit the possibility of the Commission to file observations provided Article 15(3) is met.²⁰³

The Advocate General did not address the disjuncture in the wording between Regulation 1/2003 and the Explanatory Memorandum to the Dutch Competition Act as described in the *Gerechtshof's* deliberations.²⁰⁴ Nor did he explicitly raise the soft law point that recitals in a Regulation, or in a Notice, cannot restrict the terms of an Article in that Regulation. The opinion did not refer to the specific provisions of the Courts notice, in particular recitals 31 and 35 which were examined by the Amsterdam Court. He did, however, mention it as an “interpretative text”.

In contrast to the Advocate General, the Court did make reference to the fact that recitals and notice provisions should not prevail over provisions in the Regulation (1/2003) itself. Referring to recital 21 of Regulation 1/2003, which states that the Commission and NCAs should be able to submit written or oral observations to courts “called upon to apply” Articles 101 or 102 TFEU (see Advocate General’s discussion above), “whilst a recital in the preamble to regulation may cast light on the interpretation to be given to a legal rule, it cannot in itself constitute such a rule.” The Court added that “the recital refers merely to a typical situation but does not exclude other situations in which the Commission may intervene”. It is submitted that there is not really any evidence for this. In addition, “the content of a Commission notice cannot prevail over the provisions of a regulation.”²⁰⁵

In considering the two different types of intervention in Article 15(3) “with two separate fields of application” by national competition authorities relating to the application of Articles 101 and 102 on the one hand, and intervention by the Commission where the coherent application of Articles 101 or 102 TFEU so requires on the other [28], the Court drew inferences about the legislative intent: “...the fact that the second and fourth

²⁰³ opinion at [43]-[44]

²⁰⁴ Incidentally, the Dutch provision (Law introducing new rules on economic competition – *Wet houdende nieuwe regels omtrent de economische mededinging (Mededingingswet)* of 22 May 1997 (Stb. 1997, no. 242), as amended by the law of 9 December 2004 (Stb. 2005, No. 172), Article 89h) states that the Netherlands Competition Authority and the European Commission may submit observations pursuant to Article 15(3) in *appeal* proceedings before the *Administrative Court* [6]: Article 89h(1) – the national provision would suggest that observations may not be submitted at first instance, or in other tribunals. This potential obstacle does not appear to have been taken up either by the national court or the CJEU. The explanatory memorandum to the law on competition, (Kamerstukken II, session 2003-2004, 29276, No 3 at para 3.4), explains that the implementation of Article 15 also takes place before the civil courts by amendment of the Code of Civil Procedure, *Wetboek van Burgerlijke Rechtsvordering* Article III. Para [7]

²⁰⁵ Judgment [31]-[32], citing Case 215/88 *Casa Fleischhandels* [1989] ECR 2789, [31] and Case C-136/04 *Deutsches Milch-Kontor* [2005] ECR I-10095, [32]

sentences are almost entirely identical, emphasises the fact that the Community legislature intended to draw a distinction between these two situations...²⁰⁶.

According to my own research into the Council negotiations, however, this does not seem to have been an explicit issue. Some Member States took positions on NCAs acting as intermediaries of the Commission, but there is nothing specific about the differentiated circumstances in which NCAs and the Commission would intervene. The most relevant point is in document 9999/01 Secretariat to delegations of 27 June 2001, in which the Netherlands delegation proposed referring to "the interest of Community competition policy" rather than "Community public interest".

When it submits observations, the Commission does not gain the full status of intervening party. Even if the Commission had a 'private' interest in the outcome of the case, as argued by the Dutch government, it is extremely difficult to separate that from the Commission's public interest in intervening on the basis that the coherent application of EC competition rules is compromised.²⁰⁷ The Advocate General concluded that it therefore does not encroach on Member States' procedural autonomy.²⁰⁸ However, he also stated that the Commission's intervention does not affect the rights of the parties to the dispute. In this case, the parties had had opportunities to respond to the Commission's request and each other's observations, as provided for in Article 89h of the Dutch Competition Act 2004, which they did in April 2007, and at a hearing in August 2007, when the Commission's competence to submit an *amicus curiae* brief was raised. In other Member States, however, the parties' rights *would* be affected particularly if they had no right to reply. This could leave the door open to a future preliminary reference on the admissibility of Commission interventions.

6.2 'Conditions' for intervention

The parties' arguments focused on the meaning of the Commission's competence to submit observations "where the coherent application of Article [101] or Article [102] of the Treaty so requires". X BV and the Dutch government favoured a strict interpretation, with Commission interventions limited to cases where the national judge is invited to interpret or apply one or other of Articles 101 and 102 TFEU.²⁰⁹ The Commission

²⁰⁶ Judgment at [29]

²⁰⁷ Opinion at [59], [61]

²⁰⁸ Opinion at [63]

²⁰⁹ Summarised at [21] of the Advocate General's opinion

(supported by the Italian government) argued that this imposed a “supplementary condition”, and that it has sufficient grounds to submit observations where the case could “compromise the coherent application of the Community competition rules”.²¹⁰ It argues that recital 21 of Regulation 1/2003, discussed above (submissions to national courts “called upon to apply Article [101 or 102] of the Treaty”), cannot restrict a wide interpretation of Article 15(3).

The literal interpretation followed by the CJEU itself led it to conclude that the “option” for the Commission to submit written observations on its own initiative “is subject to the “sole condition” that the coherent application of Articles 101 or 102 TFEU requires the Commission’s intervention. “That condition may be fulfilled *even if* the proceedings... *do not pertain* to issues relating to the application of [those articles].” (emphasis added).²¹¹ In particular, the CJEU said that the effectiveness of the fines imposed by the Commission under Article 103(2) TFEU is a condition for the coherent application of Articles 101 and 102 TFEU as they are used to “ensure compliance” and “effective supervision”.²¹²

The Commission contended it has a legitimate interest in submitting observations, because the fines sanctioning anti-competitive behaviour are linked to the application of Articles 101 and 102 TFEU, as indicated through Article 103(2)(a) TFEU, the legal base of the Commission’s power to impose fines on undertakings which have infringed those articles.

More interestingly, in its arguments to the Court, the Commission couched the potential to intervene in terms of its own “significant margin of appreciation”, in examining whether it is necessary for it to submit observations in a case before a national court,²¹³ rather than the discretion of the national court to use its observations. (This is interesting as this phrase is more often used in judicial review cases when the Commission makes economic assessments, and denotes a wide area of discretion.) The Advocate General seemed to subscribe to this view, referring to the ‘right’ of the Commission to submit written observations.²¹⁴ Whereas the Advocate General’s opinion focused on the Commission ensuring coherent application regarding the effects of one of its *own* decisions (rather than, for example, in a follow-on action from an NCA), the CJEU did not expressly make this limitation.

²¹⁰ Summarised at [22] of the Advocate General’s opinion

²¹¹ Judgment at [30]

²¹² Judgment at [37]

²¹³ Judgment at [22]

²¹⁴ Opinion at [27], [57]

On the interplay with Article 15(2), Advocate General Mengozzi opined that there should be no condition for intervention that the judgment had already been notified to the Commission under Article 15(2). Otherwise, the Commission would be unable to submit observations to first instance courts, or where it had found out about a possible risk to consistent application of the rules by other means.²¹⁵ In this case, it had been notified through the Dutch competition authority and the press. The first instance judgment had not been reported under Article 15(2), perhaps primarily as it was not labelled as a ‘competition’ case.

The Amsterdam Court of Appeal subsequently ruled²¹⁶ in line with the Commission’s opinion as to the result - fines imposed by the Commission for a cartel law infringement are not deductible from taxes in domestic law – but any discussion of effective application of EU law is absent. The Commission’s opinion is not even explicitly mentioned. Moreover, the Amsterdam Court states that its conclusion would be the same “no matter whether it is a fine from the European Commission or the Dutch competition authority”.²¹⁷ This may give a clue as to the attitude of the domestic courts towards Commission intervention. Having said that, the judgment does not make reference to the CJEU’s preliminary ruling either.

In a further appeal to the Supreme Court (Hoge Raad),²¹⁸ the firm and the Dutch government both argued against allowing the Commission’s intervention again. The Commission once again announced its intention to intervene. X BV argued that it should not be admissible because the Commission was involved with the facts of the case. The Secretary of State was also opposed on the grounds of the earlier CJEU preliminary reference. The Dutch Supreme Court rejected the argument that the Commission should only intervene once, as intervening in the highest court would have the most effect.

Responding to the Dutch government’s substantive concern about the Commission’s own interest, the Advocate General in the CJEU had stated that judicial independence is not challenged, as the Commission’s opinion is not binding.²¹⁹ Since the CJEU’s ruling confirmed that the European Commission may intervene in national court proceedings not

²¹⁵ Opinion at [48]

²¹⁶ 08/01180, LJN: BL7052, 11 March 2010

²¹⁷ 4.3.2 of the judgment: “geen verschil of het gaat om een boete van de Europese Commissie of van de Nederlandse Mededingingsautoriteit.” (my translation in text)

²¹⁸ Available at www.rechtspraak.nl Opinion of A-G Wattel 16.11.2010, Case V-N 2010, 65.4, LJN B06770. Hoge Raad CPG 10/01358. Final judgment 12.8.2011 (published 18.4.2012) – appeal unfounded

²¹⁹ See opinion at [6], [63], [66]

only when the judge is actually applying Articles 101 and 102 TFEU, but also where proceedings in some way link to the effective application of those Articles, in practice it could allow the Commission to intervene, for example, in contract disputes, follow-on damages cases from NCAs, and, even in criminal prosecutions. Arguably this extended competence was never intended by the Regulation.

7. Conclusions

This chapter has investigated the diagonal relationship between the European Commission, as administrative supranational authority with quasi-judicial functions, and national courts. Previously, the Court of Justice's preliminary reference procedure, a 'dialogue between courts', was the only formal link between the courts of the Member States and the supranational level. This chapter has shown how the European Commission has added to this general (EU law) institutional link through the specific (to competition law) instrument of opinions and own-initiative interventions to national courts in competition cases, under Art 15 Reg 1/2003. This tool is designed in the absence of a formal judicial network to promote consistent application following decentralised enforcement of the EU antitrust rules under Articles 101 and 102 TFEU. The chapter drew on original research into the pre-legislative documents on Art 15 Reg 1/2003.

In the absence of a formal judicial network, the Article 15(3) mechanism contributes to safeguarding consistent application of Community competition rules in the decentralised enforcement system. However, it raises constitutional questions about the effect of concurrent competences on the institutional balance at the supranational level between the Commission and the Court of Justice, and diagonally in terms of the effect on national judicial autonomy.

The discussion took both a theoretical and a practical approach. The theoretical element examined the legal nature of the Commission opinion as an EU instrument, the ways in which the opinion could become binding drawing from the soft law literature, and the relationship with the judicial preliminary reference procedure.

The legal effect of an opinion to a court is uncertain, especially as this type of opinion is unique in the EU order. It does not fit easily into the category of soft law instruments establishing 'rules of conduct.' Commission opinions could become binding indirectly

through the national court's judgment, particularly if it essentially transposes the Commission's advice.

Regarding the institutional balance between the Commission and CJEU, it could be argued that the Commission is taking over a role - ultimate interpretation of EU law through preliminary references - granted to the CJEU in the Treaty. However, the CJEU itself has assented to a wide jurisdiction for the Commission's intervention, as demonstrated by its preliminary ruling in X BV. The concurrent powers of the CJEU and Commission suggest that where the Commission authors soft law instruments at the legislative level, or makes a quasi-judicial decision (such as imposing a fine) regarding specific parties, it has primacy over interpretation at the enforcement level. This is coupled with the CJEU restricting its own jurisdiction regarding NCAs as explored in the previous chapter.

From a practical perspective, the chapter undertook an analysis of the emerging practice under Art 15, reporting original research into all the opinions and own-initiative interventions so far. I found 23 opinions under Art 15(1) and 9 interventions under Art 15(3). The Commission has been more transparent since early 2012 by making available some interventions on its website. This is more evident regarding 15(3) interventions, although one Austrian case is still absent. The Commission may be more sensitive to the transparency of these own-initiative interventions. In addition, these are the cases in which it has felt compelled to intervene, and so represent competition issues which it finds to be most important for coherent application. As such it is in the Commission's interest to publish them. By contrast, only around a quarter of the opinions requested by national courts under 15(1) have been publicised. This lack of transparency raises questions about the 'back door' influence of these opinions in the judicial proceedings. Moreover, it does not help legal certainty and consistent application throughout the EU. Ideally these interventions should also be published in different language versions for maximum positive impact on consistent application. As a further positive effect, this would promote awareness among judges of cases in other Member States.

It is not always easy to observe what happened in the national court and the influence of the Commission on those proceedings. Without interviewing judges, court staff or those involved in the cases the judgment is the only evidence. This depends on access to national databases and ability to read the relevant languages. Sometimes the judgment itself does not refer to the Commission's observations in any case (for example, in the X BV Amsterdam Court of Appeal judgment). It is also difficult to observe those cases in which

an opinion was requested but the Commission declined, or where a party wanted to request an opinion but the national judge did not grant that request.

The case law demonstrates that the competence of the Commission to intervene in national court proceedings is not strictly limited to cases directly applying Art 101 or 102 TFEU. I also find a third category between Art 15(1) and 15(3): cases in which the Commission was 'invited' to intervene but no specific questions were put to it. A number of 15(3) submissions so far have been related to block or individual exemptions which, pre-2004 reform, would have been in the sole jurisdiction of the Commission.

National judicial autonomy favours minimal Commission intervention. The converse argument is why does the Commission not intervene in *more* cases? There is a certain amount of demand from parties and their legal representatives for the Commission to make more use of these instruments, as responses to the consultation on the first five years of the functioning of Regulation 1/2003 suggest.²²⁰ The Commission itself may not want to do so for fear of raising its caseload. In relation to the European Competition Network one Commission official said that intervening all the time (e.g. by taking over a case from an NCA under Art 11(6) Reg 1/2003) would be the "worst case scenario"²²¹. A question for further research is how the Commission decides where to intervene.

Given the small but not insignificant number of cases so far where the Commission's opinion was sought, it remains to be seen how judges will avail themselves of this mechanism relative both to the preliminary reference procedure, and to the possibility of calling on the national competition authority which operates within the framework of the ECN. That is likely to depend on individual judges and judicial preferences in different Member States. Art 15(3) Reg 1/2003 also allows national competition authorities to intervene in national judicial proceedings in their *own* Member State. Together with the proposal discussed in the following chapter, this could bring national courts indirectly into the European Competition Network. That could have positive benefits for the consistent application of the EU competition rules, but also brings judicial autonomy into question. The following chapter discusses the extension of the Masterfoods rule on the effect of European Commission decisions. It explores the proposal in the forthcoming draft directive on damages actions to introduce the binding effect of national competition authorities' decision on national courts throughout the EU. That is, for foreign NCAs to bind civil courts.

²²⁰ 2009 Report on the functioning of Reg 1/2003, 9

²²¹ Interview with DG COMP from ECN unit 13.7.2006

CHAPTER 5: BINDING THE JUDICIAL WITH THE ADMINISTRATIVE:

The Proposal for the Binding Effect of National Competition Authority Decisions on National Courts¹

1. Introduction

The previous two chapters explored the diagonal relationships between judicial and administrative bodies on the supranational and national levels: respectively between national competition authorities (NCAs) and the Court of Justice of the European Union, and between the European Commission and national courts. In terms of the institutional diagram in the introduction to this thesis, the *Masterfoods* rule, according to which Member State courts cannot take a decision running counter to one by the Commission, encapsulated a link between the European Commission and the national courts. This chapter investigates the extension of that rule – the proposal in the European Commission’s White Paper and draft directive on damages actions for breach of EU antitrust rules to make NCA decisions binding on civil courts throughout the EU (‘the binding effect rule’)². This specific example is used to explore the impact of EU antitrust measures on the relationship between competition authorities and courts – and judicial and administrative bodies more broadly - on the national level. On the institutional diagram, this represents the line between national competition authorities and national courts adjudicating in cases between private parties, which would normally be in the domain of national procedural rules. This chapter contributes to the question of the impact of the 2004 and more recent competition reforms on national courts and judicial autonomy.

The binding effect proposal is put forward in the context of a wider package of recommendations to overcome substantive and procedural hurdles and enable victims of infringements of EU competition law to exercise their rights to compensation. It aims to incentivise claimants to bring private enforcement cases in civil courts by alleviating their

¹ A shorter version of this chapter was published as K Wright, ‘Binding the Judicial with the Administrative: Some Aspects of the European Commission’s White Paper on Damages Actions for Breach of EC Antitrust Rules’ (2008) *European Current Law*, November 2008 xi-xv. Some ideas also appeared in K Wright ‘Book review: M Danov, Jurisdiction and Judgments in Relation to EU Competition Law Claims’ (2012) 37(3) *European Law Review* 355-358

² White Paper on Damages Actions for Breach of the EC antitrust rules COM (2008) 165, 2.4.2008, Chapter 4; and Article 12 of the (leaked) draft directive according to E Truli ‘White Paper on Damages Actions for Breach of the EC Antitrust Rules: the Binding Effect of Decisions Adopted by National Competition Authorities’ (2009) 5(3) *European Competition Journal* 795-821, 801, fn 42

burden of proof.³ On pragmatic grounds the rule would avoid re-litigation of issues in public and private enforcement,⁴ and could contribute to consistent application of the EU competition rules by indirectly linking national courts to the European Competition Network (ECN).

However, such a proposal carries much broader constitutional significance in terms of the interaction between judicial and administrative institutions and their decisions. These constitutional consequences, and in particular the asymmetric effects between courts and NCAs, have been less emphasised. The proposed rule creates an apparent hierarchy of administrative decisions over court judgments, narrowing the field of civil courts' jurisdiction and impeding judicial autonomy. These constitutional consequences will be explored in this chapter.

Chapter 2 discussed the judicial functions of norm interpretation and precedent-setting which may also be carried out by administrative agencies. In light of these judicial functions, the previous chapter (chapter 4) explored the interpretative function through European Commission intervention in national court proceedings. That chapter discussed the Commission's 'preliminary reference procedure' and how a Commission opinion may become indirectly binding through national court judgements which transpose the advice. In this chapter, the binding effect of NCA decisions relates to another aspect of the judicial function discussed in chapter 2: precedent-setting. The legal force of these decisions will be exerted on courts themselves.

The chapter is informed by my original research on the legislative process behind Reg 1/2003, in respect of the effect of Commission decisions on national courts, and on horizontal relations between national competition authorities within the European Competition Network. This original research was conducted by consulting Council of Ministers documents on the Reg 1/2003 negotiations as well as through interviews with European Commission and national competition authority officials. I have also looked

³ The White Paper also covers issues of standing and collective redress, access to evidence, fault requirements, damages, defences, limitation periods, costs, leniency programmes, and the relationship between public and private enforcement of EU competition law.

⁴ Avoiding re-litigation and enhancing judicial economy is the headline presented by the Commission justifying the rule: 'What does the White Paper suggest to avoid the re-litigation of issues already decided?' in the Policy paper on compensating consumer and business victims of competition breaches – frequently asked questions, MEMO/08/216, Brussels 3.4.2008, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/216&format=HTML&aged=0&language=EN&guiLanguage=en>, accessed 13.7.2010.

comprehensively at the consultative process behind the proposed binding effect rule with reference to responses to the White Paper on damages actions.

According to the European Commission's work programme⁵, the directive containing this proposal will be formally proposed towards the end of 2012, making the discussion in this chapter particularly timely. Having looked at the current interactions between national courts, the Court of Justice, the European Commission and national competition authorities, this chapter looks ahead to this forthcoming legislation which will affect institutional interactions between judicial and administrative authority at the national level.

1.1 Outline of the chapter

The rest of this chapter is structured as follows. I first lay out the background to the binding effect proposal and its relationship with the 2004 reforms and the right to damages. Secondly I consider the proposed binding effect rule in more detail with its purpose and scope. In investigating the scope of the rule, I consider its explicit terms and other open questions, evaluating the extent of limits on civil courts' jurisdiction. Thirdly, in considering the basis for the rule, I discuss the extension of the *Masterfoods* rule; the horizontal application of the duty of loyal cooperation between sub-state bodies; and the analogy with the Brussels I Regulation on recognition of court judgments across Member States (I return to the specific Treaty legal base in the final section.) The fourth section investigates the asymmetric effects to which the rule could give rise, taking into account the lack of binding effect between NCA decisions within the European Competition Network and a reverse of the principle of equivalence, according to which national NCA decisions would be treated less favourably than NCA decisions from another Member State. Having considered the desirability of the rule and some of its unintended consequences, the fifth section turns attention to the possibility and likelihood of the rule being adopted. This section assesses the current status in the Member States of national competition authority decisions in court proceedings between private parties; objections and obstacles to adoption of the rule in the Member States; and, more practically, the current state of play of the draft directive and its legal base issues. The chapter concludes with an evaluation of conditions for the rule's adoption.

⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission Work Programme 2012: Delivering European Renewal, Brussels, 15.11.2011 COM (2011) 777 final

2. Background to the rule and relationship with the 2004 reforms

In December 2005 the European Commission published a Green Paper,⁶ itself responding to the results of a 2004 comparative study identifying and analysing the obstacles to successful damages actions in the EU Member States. The Green Paper found a "total underdevelopment"⁷ of actions for damages for breach of EC competition law, and an "astonishing diversity" in the approaches taken by the different Member States.⁸ This was followed by the publication of the European Commission's White Paper on damages actions for breach of the EC antitrust enforcement rules in April 2008.⁹ The binding effect rule is only one of its proposals; the White Paper's chapters cover measures on parties' standing to bring a claim and collective redress, access to evidence, fault requirements, damages, defences, limitation periods, costs, leniency programmes, and the relationship between public and private enforcement of EC competition law. According to leaks of the draft directive, its content is not expected to be substantially different from the provisions of the White Paper.¹⁰

The European Commission aims to stimulate private enforcement of EU competition law in national courts, complementing public enforcement by DG Competition and national competition authorities. One of the aims of the 2004 reforms was to encourage private enforcement.¹¹ In decentralising enforcement to national courts as well as competition authorities, the door was open to claimants to act as enforcers ('private attorney

⁶ Green Paper on Damages actions for breach of the EC antitrust rules COM (2005) 672

⁷ Which may not be true in some Member States, for example, Germany – see S Peyer 'Myths and Untold Stories - Private Antitrust Enforcement in German' (2010) CCP Working Paper 10-12

⁸ The Ashurst Study: Study on the conditions of claims for damages in case of infringement of EC competition rules. Comparative report prepared by Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, 31 August 2004, available at

http://ec.europa.eu/comm/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf, accessed 21.7.2010, 1

⁹ White Paper on Damages actions for breach of the EC antitrust rules COM (2008) 165 final, accompanied by a Staff Working Paper SEC (2008) 404 and an Impact Assessment Report SEC(2008) 405. The White Paper was subject to a consultation, closing in July 2008, to which the response was mixed. Subsequently the Commission drew up a draft directive, which it had intended to formally propose it in October 2009. The draft directive was however leaked in 2009. The current state of play on the directive is discussed in the final section of this chapter.

¹⁰ In October 2009 the out-going Commission decided not to formally propose the draft directive, after the European Parliament's March 2009 resolution (2008/2154(INI) P6_TA(2009)0187 urged the Commission to identify a legal basis for the adoption of the proposed measures (there was no reference to a legal base in the White Paper). The state of play on the directive, now expected before the end of 2012 according to the Commission's work programme, is discussed in the final section of this chapter.

¹¹ E.g. recital 7 Regulation 1/2003; D Woods, A Sinclair & D Ashton 'Private enforcement of Community competition law: modernisation and the road ahead' European Commission Competition Policy Newsletter no 2 Summer 2004, 31-37

generals'¹²) close to infringements, and to directly claim redress for competition law infringements as a result of which they incurred harm. Enforcement by national courts had always been possible, but practically difficult due to the bifurcation of Article 101 TFEU. Only the Commission was authorised to grant exemptions under Article 101(3), leaving the national courts' jurisdiction incomplete. In addition, the requirement for firms to notify the Commission of their agreements, and the backlog in decision-making on those notifications, meant that proceedings were still pending in the Commission. The abolition of the notification procedure, in addition to the competence to rule on the whole of Article 101, increased the ambit of national courts' competence in antitrust enforcement. This chapter shows how that ambit could narrow again with the binding effect rule.

There is an important balance to be struck to ensure that public and private enforcement are complementary. The principal aim of public enforcement must be deterrence as a whole¹³ (e.g. through punishment such as fines or even imprisonment). But competition authorities are less well placed to compensate individuals who are harmed by competition law breaches, and the Commission itself is not empowered to grant damages. As such, in private enforcement the court is called upon to compensate the individual. Private enforcement in civil courts also has a role to play in deterrence, but its primary purpose is compensation. As explained in the Staff Working Paper accompanying the White Paper, "This notion of complement covers two categories of cases. Firstly, it covers those cases where the public authorities, for reasons of limited resources and public priorities, do not take any enforcement action, or limit their enforcement activities to specific aspects of a particular behaviour. In that case, private actions for damages can extend the enforcement of EC law through what are known as stand-alone actions. Secondly, private enforcement covers cases where a private party claims damages for harm arising from an infringement established by a public authority. These are known as follow-on actions. The Commission ensured that the measures contained in the White Paper are "designed in such a way as not to jeopardise public enforcement."¹⁴

¹² Particularly used in the US context where private actions in competition enforcement are more prevalent. In the EU literature see e.g. A Andreangeli 'From Complainant to "Private Attorney General": the Modernisation of EU competition enforcement and private antitrust action before national courts' in J Peay and T. Newburn (eds) *Policing: Politics, Culture and Control. Essays in Honour of Robert Reiner* (Hart Publishing, 2012) 229-54; K Cseres 'Governance Design for European Private Law: lessons from the Europeanization of Competition Law in Central and Eastern Europe' in F Cafaggi (ed) *Making European Private Law: Governance Design* (Edward Elgar, 2008) 138-196, 143

¹³ A Komninos 'Public and Private Antitrust Enforcement in Europe: Complement? Overlap?' (2006) 3(1) *Competition Law Review* 5-26; W Wils 'The Relationship Between Public Antitrust Enforcement and Private Actions for Damages' (2009) 32 *World Competition* 3

¹⁴ White Paper staff working paper [21]

The White Paper therefore puts forward policy options to overcome perceived substantive and procedural hurdles and enable victims of infringements of EC competition law to exercise their rights to compensation. As the Commission states, the primary objective of the White Paper is to “improve the legal conditions for victims to exercise their right under the Treaty to reparation of all damage suffered as a result of a breach of the EC antitrust rules. Full compensation is, therefore, the first and foremost guiding principle.”¹⁵

Individual rights to compensation had been recognised by the CJEU in *Courage and Crehan*¹⁶ and *Manfredi*¹⁷. In *Courage*, the CJEU stated that “the practical effect of the prohibition laid down in Article [101(1) TFEU] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition”.¹⁸ Further, in *Manfredi*, “...any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article [101 TFEU]”.¹⁹ The judgment also stated that “In the absence of Community rules governing that field, it is for the domestic legal system of each Member State to set the criteria for determining the extent of the damages for harm caused by an agreement or practice prohibited under Article [101 [or 102] TFEU], provided that the principles of equivalence and effectiveness are observed.”²⁰

The Court did lay down minimum standards on the type of damages that can be claimed. According to the Court, “it follows from the principle of effectiveness and the right of any individual to seek compensation for loss caused by a contract or by conduct liable to restrict or distort competition that injured persons must be able to seek compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*) plus interest.”²¹

On a more cynical understanding, it has been suggested that the European Commission is using the CJEU’s case law as a springboard to introduce changes to Member States’

¹⁵ White Paper, 3

¹⁶ Case C-453/99 *Courage and Crehan* [2001] ECR I-6297 [28]-[29], [36]

¹⁷ Joined Cases C-295/04 C-295/04, C-296/04, C-297/04 and C-298/04 *Manfredi* [2006] ECR I-6619 [100]

¹⁸ *Courage v Crehan* [26]

¹⁹ *Manfredi* [61]

²⁰ *Manfredi* [98] In its White Paper [186], the Commission states that “Although the judgment only refers to Article 81 EC [101 TFEU] because of the facts underlying the case, the reasoning of the Court is such that it can also be applied to Article 82 [102 TFEU] cases.”

²¹ *Manfredi* [95]

procedural law, whilst arguing that competition enforcement is ‘special’²²: “the traditional tort rules of the Member States, either of a legal or procedural nature, are often inadequate for actions for damages in the field of competition law, due to the specificities of actions in this field.... In addition, the different approaches taken by the Member States can lead to differences in treatment and to less foreseeability for the victims as well as the defendants, i.e. to a high degree of legal uncertainty.”²³ As early as the annual Florence workshop on EU competition law in 2001, it was suggested that legislation, possibly a regulation based on Art 83 EC [now Art 103 TFEU], “would have to lay down specific rules on remedial relief”, going beyond the negative integration measures of the principles of equivalence and effectiveness.²⁴ However, it was acknowledged that reform and harmonisation of procedural rules, perhaps even more so than substantive ones, was politically sensitive. Doubts still remain about EU competence in national procedural matters²⁵.

The proposal to allow the binding effect of NCA finding of infringement on courts throughout all Member States is promoted in the context of the draft directive as a whole: the principal aim of the proposal is to encourage damages actions by alleviating the burden of proof on the claimant, avoiding re-litigation of issues; boosting judicial economy; and promoting consistent application. However, less attention has been given to judicial autonomy and the effects of the rule on internal Member State institutional structures.

There are various policy options pertaining to this proposal in the Commission’s impact assessment, which are part of a package with other aspects of the White Paper: Options 1&2 - findings of NCA binding if not appealed or if confirmed on appeal; Option 3 - binding only on courts of the Member State whose competition authority issued the decision; Option 4: non-regulatory approach – based on best practice and recommendations only; Option 5: no action – maintain the *status quo*. The first is the Commission’s preferred option. From the 2005 Green Paper²⁶, the Commission has already rejected the option of

²² F Marcos & A Sánchez Graells (2006) ‘Towards a European Tort Law? Damages Actions for Breach of the EC Antitrust Rules: Harmonising Tort Law Through the Back Door?’ Presented at the IV International Congress ‘European Private Law Beyond The CFR’, Lleida, Spain, 25-26. 10.2007. Available at SSRN: <http://ssrn.com/abstract=1028963>. Also published in (2008) 16(3) *European Review Private Law* 469-488

²³ Staff Working Paper [5]

²⁴ C-D Ehlermann & I Atansiu (eds) *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law*, European University Institute (Hart, 2003), Introduction, p. xxxii

²⁵ See C Leskinen ‘The Competence of the European Union to Adopt Measures Harmonizing the Procedural Rules Governing EC Antitrust Damages Action’ (2008) Working Paper Instituto de Empresa Law School, Madrid for a discussion of potential legal bases.

²⁶ Green Paper on damages actions for breach of the EC antitrust rules, COM(2005) 672, 19.12.2005

the NCA infringement decision creating only a rebuttable presumption in damages actions rather than irrefutable proof. A number of critics of the proposal, particularly on grounds of judicial independence, would however advocate the rebuttable presumption option. This chapter revisits and analyses those concerns.

3. The proposed rule and its purpose

Currently, where national courts rule on agreements, decisions or practices under Art 101 or 102 TFEU which are already the subject of a European Commission Decision, they cannot take decisions running counter to that decision. If the Commission is contemplating a decision, the national court must avoid adopting a decision that would conflict with it.²⁷ This rule was established by the European Court of Justice in *Masterfoods Ltd (t/a Mars Ireland) v HB Ice Cream Ltd* (C-344/98),²⁸ and subsequently codified by Art 16 of Regulation 1/2003²⁹ which decentralised enforcement of EC antitrust rules. In a decentralised system, this rule contributes to the consistent application of Community law. It also implies that when the European Commission finds a breach of the competition rules, victims of that infringement can rely directly on the Commission's Decision as binding proof in civil proceedings for damages. However, the current proposal would go beyond this existing *acquis communautaire*. Even as it stands, the obligation in the *Masterfoods* rule is not entirely unambiguous, as discussed below.

Now, in the White Paper and draft Directive, the Commission proposes that when national courts, in actions for damages, rule on conduct under Article 101 or Article 102 TFEU which is already the subject of a final decision finding an infringement of those Articles by a national competition authority within the European Competition Network, they cannot take decisions running counter to that decision. The rule would mean that where a national competition authority finds an infringement of the EU antitrust rules, a complainant would be able to rely on that finding as irrefutable proof, not just as a presumption, when bringing a damages claim based on that breach in a national court in any Member State, without the necessity for further proof. The national court would not be permitted to reinvestigate the facts which led to the finding of infringement. The

²⁷ See A Komninos, 'Effect of Commission Decisions on Private Antitrust Litigation: Setting the Story Straight' (2007) 44 *Common Market Law Review* 1387-1428 for discussion of the impact of a Commission decision on national proceedings in various scenarios, at 1404-1422

²⁸ C-344/98 *Masterfoods Ltd (t/a Mars Ireland) v HB Ice Cream Ltd* [2000] ECR I-11369

²⁹ Regulation 1/2003 on the implementation of the rules of competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1

relevant section of the White Paper is 2.3, with reasons explained more fully in Chapter 4 of the Staff Working Paper accompanying it: “National courts that have to rule in actions for damages on practices under Article [101 or 102] on which an NCA in the ECN has already given a final decision finding an infringement of those articles, or on which a review court has given a final judgment upholding the NCA decision or itself finding an infringement, cannot take decisions running counter to any such decision or ruling”.³⁰

The proposed rule would put NCA decisions on a par, with some caveats, with those of the Commission in national courts, and therefore goes beyond the existing *acquis communautaire*. Existing EU law states that where national courts rule on agreements, decisions or practices under Art 101 or Art 102 TFEU which are already the subject of a European Commission Decision, they cannot take decisions running counter to that decision. If the Commission is contemplating a decision, the national court must avoid adopting a decision that would conflict with it, according to *Masterfoods*³¹ codified in Art 16 Reg 1/2003. The *Masterfoods* rule as a basis for binding effect of *NCA* decisions is discussed in further detail below. The caveats are first, it would apply only to proceedings involving the same infringers and same practices. Secondly, only final decisions would be binding, implying that all appeals would have to be exhausted and time limits expired. Thirdly, it is without prejudice to the national court’s right, or obligation in the case of highest courts, to seek clarification on the interpretation of Article 101 or 102 TFEU by preliminary reference to the ECJ.

The rationales for the rule are to promote legal certainty and consistent application of EC competition rules; to avoid re-litigation of issues, boosting judicial economy; and to alleviate the burden of proof on the complainant in bringing a damages action, to encourage greater private enforcement throughout the Community to complement public enforcement by competition authorities. Although it is not specifically stated in the White Paper, the rule could indirectly bring national courts into the European Competition Network; but leaving the competition authorities in primary position. National judges could still contribute to the development of EC competition law - the burden of proving causal link, effects of the infringement and quantum of the damages should remain with the complainant for determination by the court - but in a more limited way.

³⁰ White Paper, 6; Staff Working Paper, 45

³¹ C-344/98 *Masterfoods Ltd (t/a Mars Ireland) v HB Ice Cream Ltd* [2000] ECR. I-11369

4. Hierarchy of administrative over judicial decisions?

Making NCA decisions binding on national judges in effect creates an institutional hierarchy of the decisions of administrative authorities over courts.³² Actual or perceived general hierarchy of decisions of administrative bodies over civil court judgments, or of public over private enforcement, should be avoided. Komninos recognises this, but on the grounds that public and private enforcement are two separate limbs of antitrust enforcement independent of, if complementary to, each other somewhat hopefully argues that the proposed rule “does not bring into question the principle of independence since such measures are only intended to function as incentives for follow-on civil actions”.³³

Even if there is no real hierarchy of public over private enforcement, the binding effect rule certainly limits the ambit of judicial competence. “An absolute rule runs counter to national rules of evidence which permit or require the national judge freely to evaluate every piece of evidence.”³⁴ The Commission plays down these concerns arguing that in practice, the requirement that the NCA decision should be final before its binding effect applies means that it would have been upheld by an appeal or review court. It would often - although not always - be a judgment confirming the NCA decision that binds the judge hearing the civil case on damages claims.³⁵ This argument is obviously less strong if the decision was not in fact appealed, even if the Member State allowed the possibility for an appeal. It also neglects the question of different levels of intensity of judicial review across the Member States. More broadly, it creates a precedent of administrative decisions over judicial rulings, which could have an effect beyond competition law in Member States’ systems.

³² It is important to take in account the different roles of courts in the competition enforcement system. Under Art.35 of the Modernisation Regulation a Member State may designate a court as a national competition authority or choose a bifurcated system where an administrative authority carries out the investigation but a judicial body makes the determination of an infringement, but this would be in a first instance public enforcement capacity rather than in a strictly reviewing function. Chapter 3 investigated the significance of these configurations for access to the preliminary reference procedure.

³³ A Komninos “Public and Private Antitrust Enforcement in Europe: Complement? Overlap?” (2006) 3(1) Competition Law Review 5-26, 26.

³⁴ AECLJ Association of European Competition Law Judges response to White Paper

³⁵ Staff Working Paper [149]

5. The scope of the rule

To determine in what respects the proposed rule limits the ambit of judicial competence, a consideration of the scope of the rule is necessary. The White Paper outlines the scope and conditions of the binding effect of NCA decisions on national courts throughout the EU. The staff Working Paper accompanying the White Paper goes into more detail and explains that the rule as currently proposed is based on the *Masterfoods* rule as codified in Art 16(1), but “should be more limited than this rule in several respects”:³⁶ it relates to the same infringers *and* practices³⁷; only final decisions are binding, meaning that appeals are exhausted and limitation periods expired,³⁸ and it is also without prejudice to the right (or obligation) of a national court to address a preliminary reference to the CJEU.³⁹ In addition, the rule would apply only to findings of infringement, and not to findings that there is *no* infringement of EU competition rules.⁴⁰

These conditions provoke some open questions: the meaning of same infringers and same practices; the remedy sought in the civil court proceedings; the effect of other decisions *not* finding an infringement; and the meaning of final determination.

5.1 ‘Same infringers and same practices’

The first point is the definition of ‘same infringers and same practices’. The White Paper clarifies that the NCA decision’s probative effects “can only relate to the same agreements, decisions or practices that the NCA found to infringe Art 101 or 102 TFEU *and* to the same individuals, companies or groups of companies which the NCA found to have committed this infringement (*normally* the addressee(s) of the decision)”⁴¹ [emphasis added]. This brings to mind the situation in *Crehan*⁴², which concerned whether the Commission’s finding of market foreclosure in an investigation involving other parties, but on the same market, could be questioned by the national court.

³⁶ Staff Working Paper [143]

³⁷ Staff Working Paper [154]

³⁸ Staff Working Paper [149], [155]-[157]

³⁹ Staff Working Paper [150]

⁴⁰ Staff Working Paper [152]-[153]

⁴¹ Staff Working Paper [154]

⁴² *Crehan v Innpreneur Pub Company CPC* [2004] EWCA Civ 637; *Innpreneur Pub Company and Others v Crehan* [2006] UKHL 38

There is a clearly a need to identify the alleged infringer in both sets of proceedings. However, identicalness of *all* parties to the NCA and court proceedings, normally needed for *res judicata* to take effect,⁴³ cannot be required for binding effect because the claimants in the civil proceedings may not necessarily have been party to the investigation and proceedings before the NCA.⁴⁴ This lends weight to the argument that a decision may create a binding precedent beyond a specific case. The situation could become complicated where there are multiple plaintiffs and defendants, especially if they are spread across the European Union.⁴⁵ There may be problems of assigning responsibility in groups or associations of undertakings, particularly where some parties were not addressees of the decision.

To conform with Art 6(1) ECHR and Art 47 of the EU Charter of Fundamental Rights, binding effect of an NCA should be employed only when the defendants in the follow-on action were heard in the proceedings leading to the foreign NCA decision – if not as addressees of the decision at least as participants. Section 33(4) of the German Act against Restraints of Competition, taken as a model for the proposed binding effect rule in the White Paper⁴⁶, does not limit binding effect of administrative decisions to claims against parties addressed by the decision. However, it has been suggested that in practice German judges may interpret the provision narrowly to limit binding effect to decisions where the defendants have had the right to be heard.⁴⁷

⁴³ *Res judicata* precludes re-litigation of the same issue between the same parties where there has been a final judgment no longer subject to appeal.

⁴⁴ Staff Working Paper [154]

⁴⁵ As far as defendants are concerned this would include parties who are deemed to be part of the same undertaking under EU law (e.g. subsidiaries). See e.g. *Provimi Ltd v Roche Products Ltd et al* (2003) QB 6 (6 May 2003), which enabled non-UK plaintiffs to use UK courts to pursue claims against non-UK defendants. This concerned follow-on damages actions arising out of the Vitamins (Empagran, Hoffman La Roche) cartel. An English or foreign claimant seeking damages for loss suffered as a result of a breach of European competition law, can sue for its entire loss in the English courts, irrespective of where the loss was suffered, provided *there is an English subsidiary which implemented the anti-competitive conduct* even if there is no contractual relationship between that subsidiary and the claimant. Subsidiaries (both UK and non-UK) of the German company Trouw, sued various companies (UK subsidiary, EU selling subsidiaries, and parent company of Roche) in English High Court, even though had only purchased from foreign subsidiaries and not the English ones. See J Joshua ‘After Empagran: Could London Become a One-Stop Shop for Antitrust Litigation?’ (2005) 4.14(3) *Competition Law Insight* 1-6; F Bulst, ‘The *Provimi* Decision of the High Court: Beginnings of Private Antitrust Litigation in Europe’ (2003) 4(4) *European Business Organization Law Review* 623-650.

⁴⁶ According to W Wils ‘The Relationship Between Public Antitrust Enforcement and Private Actions for Damages’ (2009) 32 *World Competition* 3, as cited by E Truli ‘White Paper on Damages Actions for Breach of the EC Antitrust Rules: the Binding Effect of Decisions Adopted by National Competition Authorities’ (2009) 5(3) *European Competition Journal* 795-821, 800, fn 35

⁴⁷ W Wurmnest, ‘A New Era for Private Antitrust Litigation in Germany? A Critical Appraisal of the Modernized Law against Restraints of Competition’ (2005) 6(8) *German Law Journal* 1173.

5.2 Damages actions only

The wording of the rule as proposed in the White Paper begins “When national courts *in actions for damages* rule...”. This raises the question of what happens if a claimant is seeking, for example, a declaration and/or an injunction in the civil court proceedings. The reference to follow-on actions⁴⁸ also implies that the binding effect rule would only apply to damages actions subsequent to an NCA’s decision, not other types of remedy such as declarations under Art 101(2) for nullity, and injunction applications. The NCA may already have issued a cease and desist order, although it may not relate specifically to the effect of the anticompetitive conduct on that particular claimant.

5.3 Findings of infringement and other types of decision

Only findings of infringement are to be binding, not other types of NCA decision. The Commission’s justification for this is that the rule covers the type of decisions NCAs are empowered to make under Art 5 Reg 1/2003.⁴⁹ In particular, findings that there is no infringement are not included. Such a finding could take a number of forms. One is the situation where there is anticompetitive behaviour according to Art 101(1) TFEU, but this is mitigated under the conditions of Art 101(3), in which case the practice would not be prohibited. A further example is the case of decisions that find there is anticompetitive conduct, but it is below a certain threshold and the effects are therefore minimal (*de minimis* decisions⁵⁰).

The most pressing example is where a firm admits anticompetitive conduct but the NCA grants leniency.⁵¹ If there is no formal infringement decision, this gives rise to further potential clashes between private enforcement and the leniency programmes upon which public enforcement is based. Joshua claims (albeit without giving evidence) that “most if

⁴⁸ Staff Working Paper [153]

⁴⁹ Staff Working Paper [152]-[153]. Decisions under Art 5 Reg 1/2003 are : requiring that an infringement be brought to an end; ordering interim measures; accepting commitments; imposing fines, periodic penalty payments or any other penalty provided for in their national law.

⁵⁰ See e.g. Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*) OJ C 368, 22.12.2001, 13-15

⁵¹ External impact study ‘Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios’, December 2007, pp. 510-511, available at http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf#page=441, last accessed 24.8.2012.

not all infringement decisions involve successful immunity applications”.⁵² What about leniency leading to a de facto non-infringement decision for the first comer who is entitled to total immunity? Indeed, if there is no guarantee of anonymity, the fact that a firm had come forward, admitted guilt and been granted leniency would be evidence that the firm had been involved in anticompetitive conduct. With the European Competition Network’s model leniency programme, differences across the EU have been minimised. However, Member States require different evidence in order to consider full immunity.⁵³ As an example, the Hungarian law allows a beneficiary of immunity to avoid paying damages to claimants in follow-on proceedings until the claimants have first sought the damages from the other undertakings in respect of the same infringement.⁵⁴

5.4 ‘Final determination’

Only final determinations are binding, which “either have been accepted by their addressees (by refraining from an appeal), or which were confirmed upon appeal by the competent review courts.”⁵⁵ After this, decisions would be considered *res judicata* preventing re-litigation of the same issues which had been decided upon in the public enforcement proceedings.

This implies that before limitation periods for appeal are over, even if an infringement decision had been reached, a national court would be free to revisit the facts of the case. Whereas the national court has an obligation to stay proceedings pending a *Commission* decision by virtue of Art 16(1) Reg 1/2003, it would not have the same obligation in respect of a foreign NCA’s decision. If an appeal is pending national civil courts are “encouraged to consider whether staying their proceedings is appropriate”⁵⁶.

Staying the proceedings could, however, undermine the judicial economy benefits of the rule. Truli suggests that “courts should continue with the adjudication of the damages

⁵² J Joshua ‘After Empagran: Could London become a one-stop shop for antitrust litigation?’ (2005) 4,14(3) *Competition Law Insight* 1-6, 3

⁵³ See ECN Model Leniency Programme Report on Assessment of the State of Convergence, 15.10.2009, available at http://ec.europa.eu/competition/ecn/model_leniency_programme.pdf (last accessed 11.8.2012), and 2006 Commission notice on immunity from fines and reduction of fines in cartel cases. OJ C 298, 8.12.2006, p. 17

⁵⁴ Art 88D Hungarian Competition Act. See C Cauffman ‘The Interaction of Leniency Programmes and Actions for Damages’ (2011) 7(2) *Competition Law Review* 181-220, 204

⁵⁵ Staff Working Paper [149]. White Paper p. 5

⁵⁶ Staff Working Paper [157]

claim to the extent that the Member State has a procedural instrument to reverse the decision.”⁵⁷ This would solve the problem where an NCA’s findings, which the court had followed, were subsequently overturned on appeal; or where the NCA’s finding of infringement was confirmed on appeal and the civil court had come to a different conclusion. If not all Member States have such a reversal mechanism this could cause uneven effects. In addition, Komninos argues that the EU principle of effectiveness gives “no legal basis for the reopening of the contested judgment, if such recourse is unknown under national procedural law”.⁵⁸

One element to consider is the effect of time limits for appeals, and whether this includes only the first appeal.⁵⁹ Multiple defendants may also affect the limitation period. One approach would be for the NCA’s decision to bind a civil court in respect of defendants who have not appealed a decision, but not in respect of those who have appealed.⁶⁰ However, in the UK, the *Emerson* judgment⁶¹ means that all appeals of all co-defendants would have to be complete before the binding effect came into play. In order for this to work coherently across the Union there may need to be some harmonisation of limitation periods.

Another related issue is the precise subject of the appeal. The majority of appeals are against the level of the fine, rather than against the substance of the finding of infringement itself. The Staff Working Paper states that if the pending appeal is against the amount of the fine only, there is no risk of conflicting decisions and it would not be necessary for national courts to consider staying proceedings.⁶² It could be argued that, conversely, this proposal may encourage appeals on the substance, particularly if there were differential treatment between co-defendants who have and have not appealed as suggested above. This would arise if firms considered that the legal costs were worth it relative to the risk of damages claims to which they could be exposed. In turn, an increase in appeals would put pressure on NCA resources required to defend the decision.

⁵⁷ E Truli ‘White Paper on Damages Actions for Breach of the EC Antitrust Rules: the Binding Effect of Decisions Adopted by National Competition Authorities’ (2009) 5(3) European Competition Journal 795-821, 803

⁵⁸ Komninos (2007), 1422

⁵⁹ For example, the Czech Office for the Protection of Competition’s White Paper response notes that an NCA’s decision is reviewed by the Regional Court, but it is still possible to appeal to Supreme Administrative Court, proceed to review by the Constitutional Court and then potentially to the European Court of Human Rights.

⁶⁰ Truli, 804

⁶¹ *Emerson Electric Co v Morgan Crucible Co plc* (1077/5/7/07) [2008] CAT 8 [66]

⁶² Staff Working Paper [157]

The final issue related to appeals is the level of scrutiny at appeal. Some Member States may provide for full reinvestigation of the facts, in which the court can substitute its own decision for that of the competition authorities. Other Member States may adhere to a judicial review which does not allow for a full re-examination. The judge in Member State B who is bound by NCA A's decision may want to be assured that the procedural standards both at the investigation stage in the NCA, and at the appeal stage, are broadly on a par with those in Member State B.

The effect of a Commission decision can be removed by the Court of Justice by an action for annulment under Art 263 TFEU or a preliminary reference requested by a national court under Art 267 TFEU.⁶³ However, an NCA's decision and its cross-border effects could not be declared void by the Court of Justice, only by a national court. As far as the preliminary reference procedure is concerned, the CJEU could be called upon to resolve any of the issues of scope discussed above. In particular, it could interpret whether a national court has grounds for refusing to recognise an NCA decision. However, the CJEU would be unlikely to look into the circumstances behind the individual case, and would be reluctant to give a ruling on whether Member State A's procedural safeguards are adequate relative to Member State B.

5.5 Limiting the ambit of judicial competence?

If the binding effect rule is adopted, national courts would not be permitted to reinvestigate the facts which led to the finding of infringement. This narrows the ambit of judicial jurisdiction. However, national judges could resist this 'trespass' in a number of ways. Some of these relate to the scope of the binding effect rule proposal; other factors relate to different standards across Member States.

The first is a different set of facts in the public enforcement and civil judicial proceedings, e.g. conduct in a different time frame; different effects on that Member States' market. This would require the court to ascertain whether the facts on which the infringement was based are exactly relevant to the case in the civil proceedings.

A further example is fault requirements: according to the Commission's preferred policy option, in Member States where there is no strict liability, fault is presumed as soon as the

⁶³ Also acknowledged in Staff working paper at [141]

infringement has been established. In this context, fault would therefore be attributed by the NCA's decision. If fault conditions were different in the 'receiving' Member State court, the judge might need to reopen the question.

Where the NCA made a finding of no infringement, the rule would still allow a judge to make a positive finding, although in many Member States a finding of no infringement is persuasive. However, this is subject to the points made above about decisions other than infringement decisions.

The civil court would have full jurisdiction in stand-alone (as opposed to follow-on) cases where a plaintiff brings a case directly to court without an existing NCA investigation and attempts to prove the infringement herself. The court would also have jurisdiction on applications for other (non-damages) relief such as injunctions.

A further example is where the finding of infringement is made exclusively relating to national rules, not on EU rules *or* if based on national law which is stricter than Article 102 TFEU. This relates to the geographic market. Art 3 Reg 1/2003 requires parallel application of EU law and national law where there is an effect on trade between Member States, but Art 3(2) allows Member States to adopt on their own territory stricter national laws which sanction unilateral conduct by undertakings.

Article 34(1) of the Brussels I Regulation⁶⁴, applying to the recognition of foreign judgments, allows a court to exceptionally refuse recognition of another Member State's judgment on grounds of public policy e.g. where fair legal process may have been impeded contrary to European Convention on Human Rights and the Charter on Fundamental Rights of the European Union and the case law of the Community courts. If a provision analogous to Art 34(1) were adopted, this would be another channel for the judge to look into a foreign NCA's decision. The analogy with the Brussels I Regulation is discussed in more detail below.

The figure below gives an example of the possible effect of different standards in two Member States on the ambit of judicial jurisdiction. This could apply to different fault requirements, standards of proof, investigation standards, or levels of judicial review. The shaded area represents what is recognised in both Member States, with the bold line

⁶⁴ Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1

denoting the standard as set in that Member State. For example, in the case of fault⁶⁵, Member State 1 might have a strict liability standard, but Member State 2 might require further evidence of negligence or intention. According to the Commission's preferred policy option on fault in the White Paper, in Member States where there is no strict liability, fault is presumed as soon as the infringement has been established. In this context, fault would therefore be attributed by the NCA's decision. In the event of excusable error, the defendant can be exonerated. Under the other policy options (rebuttable presumption of fault, with exoneration for excusable error; or alternatively strong probative value of a finding of infringement), courts would have more scope for making a determination depending on national causation rules. The binding effect of the NCA infringement would not necessarily lead to a penalty or damages.

This is one way in which courts could retain the ambit of their discretion if they were uncomfortable with the binding effect rule. If a judge saw that the standard of proof was lower in the Member State originator of the decision it was asked to recognise, s/he could require further proof to meet the standard in the recognising home Member State.

On standard of proof, different types of damages - e.g. punitive, exemplary, restitutionary - may require different standards of proof. A further point is the different levels of proof in administrative proceedings and criminal or civil actions for damages. This would be less of an issue if the standard of proof were higher in administrative proceedings than in private enforcement proceedings.⁶⁶ Given the requirement of parallel application, decisions may be based on both EU and national law provisions, which may carry different standards of proof. This is particularly relevant to cases applying national laws which are stricter than Article 102. It is questionable whether it would be possible to separate out the facts which apply only to the infringement of the EU rules.⁶⁷

⁶⁵ The Staff Working Paper [163] notes that "Member States take diverse approaches on the interaction between competition law and the general rules on liability for damages, in particular as regards the question of fault (*culpa*). It is also noteworthy that the concept of fault is not a homogeneous one across Member States."

⁶⁶ National report on Sweden in G C Rodriguez Iglesias & L Ortiz Blanco (eds) *The Judicial Application of Competition Law: Proceedings of the FIDE XXIV Congress Madrid 2010 Vol 2* (Servicio de Publicaciones de la Facultad de Derecho, Complutense University, Madrid 2010); see also W Wils 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages' (2009) 32(1) *World Competition* 3-26, 17 - "Procedural guarantees for the defendant tend to be stronger in public enforcement proceedings than in civil litigation"

⁶⁷ This point is also made in the American Bar Association's response to the White Paper on damages actions.

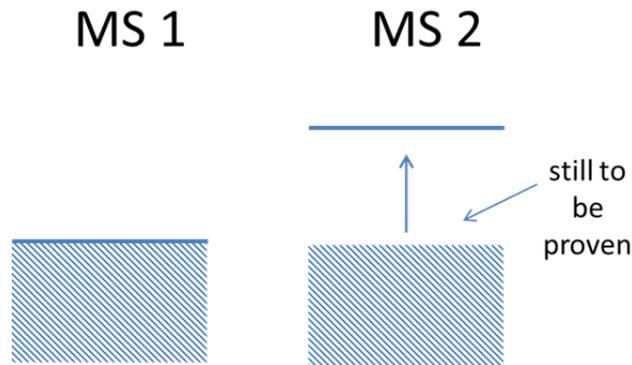


Fig 2: Example of the possible effect of different standards in Member States on the ambit of judicial jurisdiction

Only the finding of infringement itself should be binding, not findings on the *effects* of the infringement. The burden of proving causal link, effects of the infringement and quantum should remain with the complainant for determination by the court. An infringement confirmed in one jurisdiction by an NCA may not have had effects in another.

If the proposed rule were adopted, the national judge would still be responsible for assessing the causal link between the infringement and damage to the complainant, effects of the infringement, and quantum. However, in practice these judicial domains are also subject to limitation, as the Commission has issued a guidance paper on quantification of damages.⁶⁸ In addition, the Commission is studying the possibility of NCAs acting as *amicus curiae* for the purpose of quantifying damages⁶⁹.

⁶⁸ http://ec.europa.eu/competition/consultations/2011_actions_damages/draft_guidance_paper_en.pdf
 Consultation on the guidance paper was open from June until September 2011 and the Commission intends to issue a final version based on those comments. The intention to draw up non-binding guidance for courts was signalled in the White Paper, p. 7 and accompanying Commission staff working paper, p. 60. It is based on the report 'Quantifying antitrust damages: towards non-binding guidance for courts', study prepared for the European Commission by Oxera economic consultancy and a multi-jurisdictional team of lawyers 21.1.2010, available at

http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf (accessed 19.8.2010)

⁶⁹ 'Provision of non-binding assistance for quantification of damages' at 4.1.4 of the White Paper Impact Assessment Report SEC (2008) 405, 2.4.2008, p. 28. Also relevant is the external study for the impact assessment, 'Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios' – pp 200-201, 227-228, 485, table 33 of the Study, p. 242.

The aim of the Guidance paper is “to offer assistance to courts and parties involved in actions for damages by making more widely available information relevant for quantifying harm caused by infringements of the EU antitrust rules”.⁷⁰ The guidance to courts is “purely informative, does not bind national courts and does not alter the legal rules applicable in the Member States to damages actions based on infringements of Article 101 or 102 TFEU.”⁷¹ However, the draft also suggests that the guidance could be used when applying national law - i.e. not only where Article 101 or 102 are concerned – and in settlement proceedings or alternative dispute resolution as well as in the courtroom.⁷² There may also be spill-over effects for the calculation of damages in other areas of law.⁷³

Despite the non-binding nature of the guidance, some respondents to the White Paper consultation also raise concerns in principle about any guidelines restricting the ability of national judges to come to their own assessment of quantification of damage.⁷⁴ This is somewhat assuaged by the fact that rather than providing precise formulae, the guidance paper provides a range of suggested methods and models. It is therefore a “toolkit”⁷⁵ for courts rather than a template. It also provides examples from different jurisdictions and legal precedents from the European courts, which may make the guidance more amenable to national judges. It would still be for the judge to decide on the level of evidence needed to assess quantum. The guidance paper indicates that nothing in it should change the standard of proof or “level of detail required of factual submissions” as established in national law.⁷⁶

What is more likely to affect the courts’ ability to accurately calculate damages is access to evidence. In calculating harm, direct evidence, such as documents on agreed sales figures or price increases, would be helpful to the court. This type of evidence is likely to be

⁷⁰ Draft guidance paper p. 2

⁷¹ Draft Guidance paper [7]

⁷² Draft guidance paper [6]

⁷³ This was the aim of the Oxera reports authors, although it is not mentioned in the subsequent draft guidance paper: In a communication about the report, the report’s authors say that “the methods and models presented here can be used for damages estimations in those different legal contexts as well” Oxera Agenda briefing: Quantifying damages: a step towards practical guidance http://www.oxera.com/cmsDocuments/Agenda_January%2010/Antitrust%20damages.pdf, p. 6

⁷⁴ Bird & Bird White Paper response: “we would caution against proposals which could limit national courts’ ability to develop their own jurisdictional practice for damages claims by making any ‘soft law’ or guidelines too prescriptive.”; AFEP Association Française des Entreprises Privées White Paper response: “future attempts at quantification on the part of the Commission would deprive the court of its compensatory function, once again emptying the role of the court of its substance”. Possibly this is a misunderstanding – the Commission is not intending to calculate the quantum, but to give methods for doing so. However, it does demonstrate the attitude to ‘non-binding advice’ in some quarters.

⁷⁵ Oxera study, p. 4

⁷⁶ Draft guidance paper [8]

gained through leniency applications in public enforcement by competition authorities. Claimants in damages actions will find it easier to prove their loss, as well as the infringement itself, if they have access to these leniency documents. In *Pfleiderer*, the CJEU ruled that Regulation 1/2003 did not preclude the possibility of leniency documents being disclosed for the purpose of a private action, leaving it to national courts to determine the conditions under which such access must be permitted or refused by balancing the interests protected by EU law – that is, the effectiveness of leniency programmes and the right to claim damages.⁷⁷ However the *Pfleiderer* judgment led to alarm that it would jeopardise competition enforcement by discouraging cartel members from reporting each other to a competition authority if they are then going to be liable for damages in a private action. The heads of European competition authorities responded with a declaration affirming the fundamental importance of the protection of leniency material.⁷⁸ This is on the grounds that most private actions are currently follow-on actions. In the recent case of National Grid in the English High Court, the European Commission intervened in the context of a damages action brought by National Grid (UK utility company) against a number of companies that were held liable by the Commission in 2007 for their participation in the Gas Insulated Switchgear (GIS) cartel.⁷⁹ The Commission stated that the information specifically prepared for the purpose of an application under its leniency programme should not be disclosed.⁸⁰ However, the High Court took a more nuanced approach, applying a proportionality test assessing (a) whether the information could be obtained from other sources and (b) relevance of leniency materials to the case.⁸¹ As the materials were relevant and could not be obtained from another source, the Court allowed disclosure of a limited part of the confidential version of the Commission decision.⁸² As a result of these cases, the interface between leniency and damages claims is an issue that will be addressed in the draft directive.⁸³

⁷⁷ Case C-360/09 *Pfleiderer AG v Bundeskartellamt*, 14.6.2011, not yet reported [32]

⁷⁸ ECN resolution on protection of leniency material in the context of civil damages actions, 23.5.2012, available at http://ec.europa.eu/competition/ecn/leniency_material_protection_en.pdf (last accessed 11.8.2012)

⁷⁹ The Commission's intervention was discussed in more detail in the previous chapter

⁸⁰ Hearing 3.11.2011 in *National Grid Electricity Transmission Plc v ABB Ltd and other companies*: [2011] EWHC 1717 (Ch). Commission's intervention available at:

http://ec.europa.eu/competition/court/amicus_curiae_2011_national_grid_en.pdf (last accessed 11.8.2012) on whether national court has jurisdiction to order disclosure of leniency documents submitted to the Commission

⁸¹ National Grid judgment at [39]

⁸² National Grid Electricity Transmission Plc v ABB Ltd and other companies: ChD (Mr Justice Roth): hearing 4.4.2012

⁸³ p. 3 Annex to the Communication from the Commission to the European parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission Work Programme 2012 COM(2011) 777 final, Brussels, 15.11.2011 available at http://ec.europa.eu/atwork/pdf/cwp2012_annex_en.pdf, last accessed 10.8.2012

6. Bases of the rule

This section considers the possible bases of the binding effect rule. No Treaty legal basis was identified in the White Paper or the leaked draft proposal, which is one reason for its stalled progress. The possible Treaty bases are considered in more detail in the final section of this chapter. This section considers which wider principles form the foundation for the binding effect rule. There are three possibilities. The first is the explicit extension of the *Masterfoods* rule that a judgment by a national court must not run counter to a decision by the Commission. It can be argued that the Commission is delegating its power in the framework of the European Competition Network, and granting a similar effect to decisions of NCAs. The second is the duty of loyal cooperation based on Art 4(3) TEU, according to which the Union and Member States should assist each other. Of particular interest is the horizontal nature of the duty of loyal cooperation, that is, between institutions at the sub-national level. The third, lesser basis, is an analogy with the Brussels Regulation, Regulation 44/2001's provisions on the recognition and enforcement of judgments in civil and commercial matters.

6.1 Extension of the Masterfoods rule

Since the binding effect rule is explicitly an extension of the Masterfoods rule, it is important to revisit that rule and its interpretations. The existing *Masterfoods* rule, also codified in Art 16 Reg 1/2003, establishes that where a national court rules on an agreement, decision or practice under Article 101 or 102 TFEU which is already the subject of a *European Commission* decision, it cannot take decisions running counter to that decision. If the Commission is contemplating a decision, the national court has a duty to avoid adopting a decision that would conflict with it.⁸⁴

According to my original research, different interpretations of Masterfoods and resistance to its effect are evident in the pre-legislative negotiations leading to Reg 1/2003. The negotiation history of the Regulation in the Council of Ministers can be traced through the legislative amendments in the *travaux préparatoires*. By searching the register of Council

⁸⁴ A Komninos *EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts* (Hart, 2008) 112-137. L Kjølbye, 'Case C-344/98, *Masterfoods v HB Ice Cream*' (2002) 39(1) *Common Market Law Review* 175-184

documents,⁸⁵ it is possible to trace the progress of the proposal, meeting by meeting, through the Council. In some cases, the positions of Member States are discernible through annotations. The original proposal read “Member States shall use every effort to avoid any decision that conflicts with decisions adopted by the Commission”⁸⁶. Germany, Denmark, the Netherlands, Finland and Austria requested deletion of this Article as superfluous given the existing Masterfoods judgment. Denmark, France, Greece, the Netherlands and Portugal also requested clearer formulation of the obligation to avoid conflict with Commission decisions. Austria requested specific reference to the CJEU’s role.⁸⁷ France asked for clarification of the meaning of “decisions adopted by the Commission”, and later requested deletion of the paragraph that national *courts* should not adopt a decision running counter to one by Commission, without prejudice to the preliminary reference procedure under Art 267 TFEU.⁸⁸ Italy requested insertion of “insofar as the facts of the case are the same”.⁸⁹ Finland suggested an alternative – to move the rule to a ‘whereas’ clause in recitals.⁹⁰ Later Luxembourg also proposed deleting the codification of Masterfoods, and was the last Member State to sustain this position.⁹¹

According to Commission officials involved in the negotiations, Member States were not convinced about the need to codify the judgment, hoping that the CJEU would change its mind. Some Member States would only agree if the Commission had “properly investigated”. This would imply national courts being able to look behind the Commission’s decision to its evidence and reasoning. Another interviewee acknowledged that the Masterfoods rule may raise a separation of powers issue, but the important thing was that it reduced the risk of divergence of judicial interpretation.⁹² This risk of divergence had been an important argument against modernisation which the Commission wanted to dispel. A senior DG COMP official went as far as to say that the Masterfoods judgment was the “saviour” of DG COMP giving up its monopoly in enforcement.⁹³

⁸⁵ <http://www.consilium.europa.eu/showPage.aspx?id=549&lang=EN>

⁸⁶ Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 (‘Regulation implementing Articles 81 and 82 of the Treaty’) COM(2000) 582 final - 2000/0243(CNS) OJ 2000 C 365 E/28

⁸⁷ Document: 5158/01 Secretariat to delegations, 11.2001; Document: 9999/01 Secretariat to delegations, 27.6. 2001 (incorporating Document: 9999/01 corrigendum Secretariat to delegations 6. 7.2001)

⁸⁸ Document: 13563/01 (Belgian) Presidency to COREPER, 20.11. 2001

⁸⁹ Document: 5158/01 Secretariat to delegations, 11.1.2001

⁹⁰ Document: 8383/1/02 (Spanish) Presidency to COREPER, 27.5.2002

⁹¹ Document: 13983/02 Working Party to COREPER, 8.11. 2002

⁹² Interview with a DG COMP official in the Modernisation working group, Brussels, 19.7.2005

⁹³ Interview with a senior DG COMP official, Brussels, 6.9.2005

The wording of Art 16 Reg 1/2003 is identical to a paragraph in the Masterfoods judgment to lend legitimacy to the obligation.⁹⁴ Interestingly, the CJEU itself did not use the word 'binding'. Nonetheless, this is how the obligation is explicitly interpreted in the notice on cooperation between the Commission and national courts⁹⁵: "Where the Commission reaches a decision in a particular case before the national court, the latter cannot take a decision running counter to that of the Commission. The *binding* effect of the Commission's decision is of course without prejudice to the interpretation of Community law by the Court of Justice. Therefore, if the national court doubts the legality of the Commission's decision, it cannot avoid the *binding* effects of that decision without a ruling to the contrary by the Court of Justice"⁹⁶. (emphasis added) It could be argued that the Courts notice is a soft law instrument that does not have the same weight as case law and the Regulation itself. But it is a document which is meant to clarify cooperation between the Commission and national courts in practical terms.

There is also evidence that Member States themselves consider Commission decisions to be binding. The explanatory notes to the UK's Enterprise Bill 2001 explains the new section 58A and the infringement decisions which will be binding on courts: "No mention is made of those decisions of the European Commission (and other similar decisions) that are *binding* in any event by virtue of EC law."⁹⁷ How the courts actually deal with this is demonstrated by the House of Lords judgment in *Crehan*, discussed below.

There can be different interpretations of the precise obligation. Saying that courts should not take a decision 'running counter to' one of the Commission does not necessarily mean that that decision is 'binding'. A common interpretation is that it is not a positive duty to blindly follow the Commission's reasoning, but a negative duty to abstain from contradicting it.⁹⁸ "Masterfoods and Article 16 do not state that national courts are 'bound' by Commission decisions, but that they cannot take decisions 'running counter' to them. It requires in my view, in each case, to examine if the decision intended by the national court

⁹⁴ Interview with a DG COMP official in the Modernisation working group, Brussels, 14.9.2005

⁹⁵ Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, OJ 2004 C 101/04

⁹⁶ Courts notice [13]. See also the scenarios in Komninos (2007), 1404-1422

⁹⁷ UK Enterprise Bill explanatory notes 115-EN, in respect of clause 18: findings of infringement [78] available at <http://www.publications.parliament.uk/pa/cm200102/cmbills/115/2002115.htm> last accessed 20.8.2012

⁹⁸ Komninos (2007), 1392 and 1395

would prevent the binding legal effects generated *by the decision itself* from taking place...”⁹⁹ (emphasis in original).

However, the White Paper does use the word ‘binding’ in respect of the proposed effect of NCA decisions. If Commission decisions are not formally binding, why should foreign NCA decisions, which are horizontal in relation to other Member States rather than vertical as in the case of EU institutions, benefit from binding effect? Is there an institutional hierarchy?

According to the CJEU in *Masterfoods*, the Commission’s primacy over national judicial proceedings is justified so that the Commission can fulfil the role assigned to it by the Treaty.¹⁰⁰ Komninos rightly argues that the notion of bindingness is not compatible with a system of parallel competences in enforcement by the Commission, NCAs and national courts. In a section on ‘non-applicability of the supremacy rule to NCAs’ decisions’, he posits that “this leads to the conclusion that decisions of NCAs cannot...positively or negatively bind civil courts, even acting in the framework of the ECN and applying competition law under Reg 1/2003.”¹⁰¹ Such a duty may be prescribed by national law, but not by EU law.¹⁰²

Komninos denies any institutional hierarchy, but claims that national courts’ obligation is based on supremacy of EU law: “...primacy is not one of the Commission, as *competition authority*, over *civil courts*, but rather of the Commission, as *supranational Community organ*, over *national courts*.” [emphasis in original]. But as he acknowledges, this argument does not hold for precedence of NCA decisions over national courts. Gippini Fournier makes a similar point: “As a matter of law, the only thing that distinguishes a decision of the Commission applying Article [101 or 102] in an individual case from a similar decision being taken by a NCA is that the Commission’s decision is a Community act and contains provisions forming part of the Community legal order....It is not to the Commission that national courts must pay deference, but to the provisions of Community law that its decisions constitute...”¹⁰³

⁹⁹ E Gippini Fournier, ‘The Modernisation of European Competition Law: First Experiences with Regulation 1/2003 (Institutional Report to FIDE Congress 2008)’ in H F Koeck and M M Karollus (eds) *The Modernisation of European Competition Law - Initial Experiences With Regulation 1/2003: Proceedings of the FIDE XXIII Congress Linz 2008 vol 2* (Nomos / facultas.wuv, 2008), 121

¹⁰⁰ *Masterfoods* [46], discussed by Komninos (2007), 1389

¹⁰¹ Komninos (2007) 1396

¹⁰² Komninos (2007) 1397

¹⁰³ E Gippini Fournier (2008), 120

The White Paper conclusion itself also uses the term 'binding': "*Binding* effect of NCA decisions: Whenever the European Commission finds a breach of Article 81 or 82 of the EC Treaty, victims of the infringement can, *by virtue of established case law and Article 16(1)* of Regulation 1/2003, rely on this decision as *binding proof* in civil proceedings for damages." [emphasis added] Since this is 'by virtue of existing case law', it suggests that those provisions also denote binding effect of Commission decisions.

A decision of the Commission, along with other EU institutions, is presumed valid and its validity cannot be questioned by national courts. If the national court doubts the legality of the Commission's decision, it cannot avoid the effects of that decision without a ruling to the contrary by the CJEU, according to *Foto Frost*¹⁰⁴ and reaffirmed in the Courts Notice recital 13. The effect of a Commission decision can only be removed by a judgment of the Community courts in the context of an action for annulment under Article 263, or in a preliminary ruling under Art 267 TFEU.

Only where the national court cannot reasonably doubt the content of the Commission's contemplated decision, or where the Commission has already decided on a *similar* case, may the national court decide on the case pending before it without asking the Commission for information or awaiting its decision¹⁰⁵. This echoes the doctrine of precedent, where the judge interprets the case in line with existing law by following the decisions in cases with similar facts. It implies that Commission decisions may not only be binding on national courts in the same case with the same parties, but binding in other cases too.

This is tied to the question of whether the competition authority's decision and the civil court proceedings relate to the same facts and the same parties. According to Advocate General Cosmas in *Masterfoods*, there is no conflict between a judgment of the national court and a decision of the European Commission where the proceedings are not 'completely identical' (para 16). In the English case of *Inntrepreneur v Crehan*,¹⁰⁶ concerning beer tie arrangements between a brewery and a pub leaseholder, the House of Lords interpreted the Advocate General's statement as meaning that there was a requirement to accept the factual basis of a decision reached by a Community institution only when the *specific* agreement, decision or practice before the national court has also been the subject of a Commission decision, involving the *same parties*. The issue in *Crehan*

¹⁰⁴ Case 314/85 *Foto-Frost* [1987] ECR 4199 [12]-[20]

¹⁰⁵ Courts Notice recital 12

¹⁰⁶ *Inntrepreneur Pub Company and Others v Crehan* [2006] UKHL 38

concerned the Commission's finding of foreclosure in the beer tie market in the context of an investigation into other parties.¹⁰⁷

Perhaps more problematically, in *Masterfoods* the Advocate General also said that a conflict only arises "when the binding authority which the decision of the national court will have conflicts with the grounds and operative part of the Commission's decision." It is arguable that that 'grounds' of the decision could encompass findings of fact open to reconsideration by the national judge. In *Crehan* in the House of Lords, Lord Hoffman ruled that "where there is no question of a conflict of decisions [where the UK court is not considering the same agreement or conduct between or by the same parties] the decision of the Commission is simply evidence properly admissible before the English court which, given the expertise of the Commission, may well be regarded by that court as highly persuasive. As a matter of law, however, it is only part of the evidence which the court will take into account. If, upon an assessment of the evidence, the judge comes to the conclusion that the view of the Commission was wrong, I do not see how, consistently with his judicial oath, he can say that as a matter of deference he proposes nevertheless to follow the Commission."¹⁰⁸

This links to the question of which part of the decision has legal effect. Is it only the finding of the infringement itself which is binding, or also the underlying facts and reasoning - the 'grounds' which the Advocate General in *Masterfoods* referred to above - leading to that finding? Gippini Fournier's opinion is that "The Commission's *reasoning* leading it to a particular decision, including its interpretation of Article 81 or Article 82 and its *findings of fact* are clearly not 'binding' as such...It is in the operative part of the decision that specific provisions are found... This is the part of the decision that becomes part of Community law and is vested with supremacy as long as the decision stands."¹⁰⁹ However, it is not always straightforward to separate these.

According to the General Court in the case of *Vlaamse Televisie Maatschappij* in the context of State aid, the operative part of a decision "must be construed in the light of the

¹⁰⁷ *Whitbread* [1999] OJ L 88/26 dated 24 February 1999, recital 127. Commission Decision of 24 February 1999 relating to a proceeding pursuant to Article 85 of the EC Treaty (Case No IV/35.079/F3 - *Whitbread*) (notified under document number C(1999) 346)

¹⁰⁸ *Crehan* HL [69]

¹⁰⁹ Gippini Fournier (2008), 120

statement of the reasons upon which it is based”.¹¹⁰ This raises the question of whether this means that the Commission’s reasoning is also binding; or, whether subsequent cases can be distinguished based on those reasons, and as such whether the court can look into that reasoning.¹¹¹

As discussed above, there is an argument that the obligation not to take a decision running counter to one by the Commission applies by virtue of supremacy of EU law, with the decision under the ultimate control of the European Court of Justice – the relationship is not one of deference of the national court to the Commission, but of primacy of Union over national law. This makes less sense if the national court is also applying *EU* competition rules rather than national law. It would be applying EU rules if there were any effect on trade between Member States, in accordance with the requirement for parallel application under *Walt Wilhelm*¹¹² and in Art 3 Reg 1/2003. The Masterfoods obligation would not come into play otherwise. If national courts are Union courts¹¹³, then a national court’s interpretation of EU law is just as valid as the Commission’s. There may be a question over whether the national court’s judgment is “under the ultimate control” of the Court of Justice, in the sense that a national court judgment cannot be annulled by the Court of Justice, unlike a decision of the Commission under Article 263 TFEU. However, the national court’s interpretation could be subject to the preliminary reference procedure under Art 267 TFEU.

As NCA decisions do not currently enjoy the status of EU law, there is a weaker basis for the binding effect of a foreign NCA decision in the national courts of the other Member States. An argument could be made that this is a delegated power alongside the Commission’s delegated powers of enforcement to NCAs through the European Competition Network. Another basis is the more general principle of loyal cooperation.

¹¹⁰ Case T-266/97 *Vlaamse Televisie Maatschappij NV v Commission* [1999] ECR II-2329 [151]. This judgment does not mention Masterfoods directly but follows the Suiker Unie case [1975]. The Commission cites the case in the Staff Working Paper accompanying the White Paper [140]

¹¹¹ There are also cases in which Commission statements falling short of a final decision have persuasive effect on courts, such as *Postbank* and *Synthetic Rubber/ENI*, in which the Commission’s statement of objections was relied upon by claimants – see A Bouquet ‘Institutional Report’ in G C Rodriguez Iglesias & L Ortiz Blanco (eds) *The Judicial Application of Competition Law: Proceedings of the FIDE XXIV Congress Madrid 2010 Vol 2* (Servicio de Publicaciones de la Facultad de Derecho, Complutense University, Madrid 2010), 42-43; Truli, 797

Chapter 4 of this thesis also dealt with the possible legal effects of Commission pronouncements short of a decision, such as opinions in court proceedings.

¹¹² Case 14/68 *Walt Wilhelm v Bundeskartellamt* [1969] ECR 1

¹¹³ I Maher ‘National Courts as European Community Courts’ (1994) 14(2) *Legal Studies* 226-243

6.2 Duty of loyal cooperation

The duty of loyal, or sincere, cooperation in Art 4(3) TEU¹¹⁴ is concentrated on the Union and Member States assisting each other. One aspect of this is the vertical nature of the duty, between the Union institutions and the Member States. The previous version in Art 10 EC¹¹⁵ focused on the obligation of the Member States towards the Union, rather than a mutual duty. The Member States still have the obligation to “refrain from any measure which could jeopardise the attainment of the Union’s objectives”.

However, loyal cooperation also implies a horizontal element - the duties of Member States to assist each other in carrying out tasks which flow from the Treaties. Of particular interest for this chapter is the horizontal nature of the duty between institutions at the sub-national level.¹¹⁶ This horizontal duty has been established in the CJEU’s case law, for example in Case 42/82 *France v Com (Italian wine)*.¹¹⁷ Cooperation between national competition authorities and national courts is “primarily a matter of national law”¹¹⁸ – primarily, but not exclusively. The relationship between national competition authorities and national courts is subject to a horizontal duty of loyal cooperation where EU law is applied, and in cross-border matters.¹¹⁹ Conversely, Komninos argues that Art 10EC [now Art 4(3) TEU] cannot create such a horizontal duty of cooperation between national competition authorities and national courts because when applying *EU* law both are acting

¹¹⁴ “Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives.”

¹¹⁵ “Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community’s tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.”

¹¹⁶ J Temple Lang ‘The Duties of National Authorities under Community Constitutional Law’ (1998) 23 *European Law Review* 109

¹¹⁷ E.g. Case 42/82 *France v Commission* [1983] ECR 1013 (Italian wine)). See S Brammer *Co-operation Between National Competition Agencies in the Enforcement of EC Competition Law* (Hart, 2009), 422 for further discussion

¹¹⁸ K Lenaerts and D Gerard ‘Decentralisation of EC Competition Law: Judges in the Frontline’, (2004) 27(3) *World Competition* 313-349, 331-332

¹¹⁹ J Temple Lang ‘The Duties of Co-operation of National Authorities and Courts under Article 10EC – two more reflections’ (2001) 26 *European Law Review* 84, 87

as *EU* institutions.¹²⁰ As such there can be no resolution of a hierarchical dispute by using the duty of loyal cooperation.

The duty emanating from Art 4(3) TEU is not a stand-alone one,¹²¹ and must be used in conjunction with another Treaty or legislative provision. Regulation 1/2003 has made some specific duties of cooperation explicit. The question is whether the general duty of loyal cooperation in EU law stretches to requiring recognition of NCA decisions. Despite the provisions of Article 11 providing for Member States to notify each other when they open an investigation, and to share envisaged decisions 30 days before they are adopted, the Regulation does not directly address the question of recognition or enforcement of NCAs' decisions. In respect of relations between agencies in the European Competition Network, Brammer argues that there should be "deference" to other NCA decisions on the basis of loyal cooperation, which would amount to a case-by-case consideration of the effects of the decision, but apparently not full binding effect.¹²² The closest provision to one of mutual recognition is Art 13 Reg 1/2003 which gives an NCA grounds to suspend or refuse to open proceedings if another NCA is dealing with the case. Given that Member States civil courts are not members of the ECN, there are no provisions on court recognition of NCA decisions. This brings us to the analogy with the Brussels Regulation as a basis for the binding effect rule.

6.3 Analogy with the Brussels Regulation

The proposal for Member State courts to recognise and give effect to administrative authority decisions from other Member States brings to mind Regulation 44/2001, the Brussels I Regulation,¹²³ on the recognition of foreign *judgments*. The model of the Regulation is acknowledged in the White Paper proposal. The possibility of mutual recognition of NCA decisions under a multilateral treaty analogous with the Brussels Regulation was also suggested by respondents to the White paper on the reform of

¹²⁰ A Komninos "Public and Private Antitrust Enforcement in Europe: Complement? Overlap?" (2006) 3(1) Competition Law Review 5-26, 25. I make a similar point above concerning the *Masterfoods* rule and national courts as EU courts.

¹²¹ J Temple Lang 'The Duties of Co-operation of National Authorities and Courts under Article 10EC – Two More Reflections' (2001) 26 *European Law Review* 84-93

¹²² S Brammer Co-operation Between National Competition Agencies in the Enforcement of EC Competition Law' (Hart 2009) , 432 drawing from AG van Gerven in C-128/92 *H J Banks & Co Ltd v British Coal Corporation* [1994] ECR I-1209 (cited in Court of Appeal *Crehan v Inntrepreneur Pub Company CPC* [2004] EWCA Civ 637). Brammer also limits the categories of decision to prohibition and fining, excluding non-action and commitment decisions.

¹²³ Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001, L 12/1

Regulation 17, which eventually became the proposal for Regulation 1/2003.¹²⁴ However, this related to mutual recognition as between NCAs, rather than courts, and pre-dated the provisions of the ECN. Responses to the most recent consultation on damages actions argue that “greater maturity of the ECN and further development of the concept of mutual recognition in Community law” is needed before the binding effect rule is adopted.¹²⁵

The Brussels I Regulation aims to facilitate cross-border damages actions. For example, Art 6(1) allows tort victims to cumulate damages actions against all co-defendants before one court where at least one co-defendant is domiciled, rather than having to start several actions in different Member States. Art 33(1) of the Regulation is relevant for the binding effect rule discussed in this chapter, as it provides that “A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.”

Art 34(1) allows a court to exceptionally refuse recognition of another Member State’s judgment on grounds of public policy e.g. where fair legal process may have been impeded contrary to European Convention on Human Rights and the Charter on Fundamental Rights of the European Union and the case law of the Community courts.¹²⁶ The Brussels Regulation is therefore relevant in providing a template for the conditions in which a national court could refuse to recognise an NCA’s decision. The Commission has already stated that it would not object to that public policy exception being included.¹²⁷

It is submitted that any rule requiring national courts to recognise and give effect to national competition authority decisions should have at least the same safeguards of Art 34(1) of the Brussels Regulation. The conditions for recognising the binding effect of the decision of an administrative body should not be less strict than recognition of another court’s judgment. This is for two reasons. First, it would create a level playing field and a complete system of enforcement regardless of the type of decision. If this were not the case, decisions of administrative bodies would be afforded a privileged position relative to

¹²⁴ White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, Commission Programme No 99/027, Brussels, 28.04.1999. Summary of responses at http://ec.europa.eu/competition/antitrust/others/wp_on_modernisation/summary_observations.html (last accessed 16.8.2012)

¹²⁵ Addleshaw Goddard response to White Paper on Damages Actions for Breach of the EC antitrust rules COM (2008) 165, 2.4.2008; see also UK Competition Law Association; AFEC, Association Française d’Etude de la Concurrence; APDC Association des Avocats Pratiquant le Droit de la Concurrence; Slaughter & May responses making similar points

¹²⁶ C-7/98 *Krombach v Bamberski* [2000] ECR I-1935 [21]

¹²⁷ Staff Working Paper [162]

judgments of civil courts. Secondly, courts are the arbiters of due process standards. There should be at least the same safeguards for rights of defence, particularly as a review or appeal court may not have positively confirmed the NCA's decision if it has not been appealed. It would be strange to allow a court to look into whether another court's process was fair, but not allow it to look into administrative proceedings in a similar way, particularly if those proceedings had not been subject to appeal or judicial review.

Rendering an NCA infringement decision binding would increase efficiency by doing away with intermediate proceedings – there would be no need to secure a Court ruling in another Member State then use the Brussels Regulation to recognise the judgment cross-border. In practice, if the NCA's decision *is* upheld by a review or appeal court it would be simply a matter of recognising another Member State court's judgment. This 'court to court' dialogue may be more palatable and familiar to judges.

While competition enforcement can borrow from the Brussels Regulation, the Brussels Regulation can also borrow from competition enforcement. In terms of jurisdictional rules and preventing parallel proceedings, Danov proposes transposing the principle of the 'well placed to act' authority from the case allocation rules of the European Competition Network which would allow another court to decline jurisdiction¹²⁸ More interestingly, in the context of recognising foreign judgments in relation to EU competition law claims, he advocates that NCAs should be regarded as courts for the purposes of Brussels I when determining an infringement of Article 101 or 102 TFEU¹²⁹ "to avoid the risk of irreconcilable decisions being rendered on the same antitrust issue in two different Member States by different bodies (an NCA and a court)". This is clearly more constitutionally problematic. It is true that this "would be a strong argument where a judicial body had been designated as an NCA"¹³⁰ ; in practice, however, most Member States NCAs are now integrated administrative bodies, carrying out both investigative and adjudicative functions.

Art 1 of the Brussels I Regulation states that the 'Regulation shall apply in civil and commercial matters *whatever the nature of the court or tribunal*' [emphasis added]. As a result, Danov suggests that "the context in which the decision of the NCA is made would be more important than the constitutional status of the public authority before

¹²⁸ M Danov *Jurisdiction and Judgments in Relation to EU Competition Law Claims* (Hart, 2010), 130. See also K Wright book review (2012) 37(3) *European Law Review* 355-358

¹²⁹ Danov, 131, 281-282

¹³⁰ Danov, 203-4

which the proceedings are brought.”¹³¹ That is, the subject matter of the proceedings would be decisive, not whether the action is pending before a court or an administrative body.¹³²

One consequence would be that a court should stay proceedings to avoid conflict with a first-seised NCA decision, echoing the binding effect proposal. From the other side, even if a court is first seised, there is currently no obligation for a ‘non-court’ such as an NCA to stay proceedings. Danov rightly asserts that in the ongoing review of the Brussels I Regulation the different results deriving from the different constitutional statuses of courts and administrative public authorities need to be addressed. These effects also need to be addressed in relation to the current binding effect proposal.

The binding effect rule implies that civil courts must be aware of all NCA (infringement) decisions throughout EU - and show that they have been taken into account in the judgment. In practice it would be for the claimant to bring the foreign infringement decision, on which s/he would rely, to the attention of the court. Alternatively, the NCA which had become aware of another NCA’s decision through the ECN could intervene in the proceedings. The defendants could not similarly rely on a non-infringement decision. Although a non-infringement decision could be used as persuasive evidence, this asymmetric effect depending on the type of decision raises the question of equality of arms. Faced with a binding decision from the opponent, the only option would be to attempt to undermine the NCA’s original decision, by, for example, pointing to lower procedural safeguards, or less rigorous judicial review. This would allow the defendant to take advantage of a provision analogous to Art 34(1) Brussels Reg. While such a provision is an essential safeguard, it could be overused.

Rather than encouraging coherence and mutual recognition of standards, a binding rule as opposed to a rebuttable presumption could reopen the question of different investigation

¹³¹ Danov, 123

¹³² Danov 124

standards among NCAs.¹³³ This threatens to undermine the trust and mutual cooperation which counterparts in the ECN currently enjoy.¹³⁴

As a positive effect, the binding effect rule could link civil courts enforcing competition rules between private parties with the European Competition Network, made up of national competition authorities charged with public enforcement. It could contribute to aligning the decisional practice of national competition authorities and courts, minimising divergent application of competition rules between public and private competition enforcers. In practice a court would become aware of a finding of infringement through the claimant's or defendant's pleadings, or by a domestic or foreign NCA giving an opinion, joining as an intervening party or intervening as *amicus curiae* (subject to national procedural rules), having become aware through the ECN. It could function in tandem with the tools in Art.15 Reg 1/2003, as explored in the previous chapter, providing for the European Commission and national competition authorities to intervene in judicial proceedings with information or observations. The Commission and NCAs are to inform each other through the ECN if they intervene with an *amicus* brief in any case, which would indirectly link national courts with the ECN.¹³⁵ It has been suggested that national courts should be able to address questions to foreign NCAs to clarify any questions on the meaning of their decision or circumstances of their decision.¹³⁶ The idea of NCAs as *amicus curiae* has also been proposed in the context of quantification of damages in civil courts, as discussed above.

These *amicus curiae* mechanisms still leave courts reliant on, or even limited by, competition authorities. The benefits of convergence between public and private enforcers are unlikely to be realised if there are asymmetric effects in the interactions between enforcers. That is, if NCA decisions are binding on courts, but not binding on fellow NCAs.

¹³³ The different standards among NCAs, particularly different levels of resources and experience, was a consideration leading up to the 2004 reforms. This was one reason for the European Commission building in the ability to take over a case under Art 11(6) Reg 1/2003, and the reference in Art 35 Reg 1/2003 to Member States designating competition authorities "in such a way that the provisions of this regulation are effectively complied with". Source: interview with a DG COMP official from the ECN unit 13.7.2006)

¹³⁴ On trust in the ECN, see H Kassim and K Wright 'The European Competition Network: a Regulatory Network with a Difference' Paper presented at European Consortium for Political Research (ECPR) Standing Group on Regulatory Governance Third Biennial Conference, Dublin, 17-19 June 2010 reporting the results of interviews with NCA officials working in the ECN; Interview with a DG COMP official from the ECN unit 13.7.2006.

¹³⁵ See the previous chapter

¹³⁶ Joint Working Party of Bars and Law Societies of England & Wales response to White Paper on damages actions

7. Asymmetric effects and the European Competition Network

A (presumably) unintended consequence of the proposal is an asymmetry between the effects of decisions of administrative bodies undertaking public enforcement in the ECN and those of civil court judgments. There are different effects deriving from the different constitutional statuses of courts and administrative authorities. Looking at the respective relationships of courts and NCAs with the European Commission, the *Masterfoods* and Article 16(1) Reg 1/2003 obligation on courts already extends further than an NCA's duty under Art 16(2) not to counter an *existing* decision. Courts should also stay proceedings in respect of future *contemplated* decisions of the Commission. This could be evidence of a public over private enforcement/administrative over judicial hierarchy. Or it may simply reflect the reality of more structured cooperation between the Commission and NCAs within the ECN, in particular the obligations under Article 11 Reg 1/2003.¹³⁷

The European Competition Network is based on a system of parallel competences, where each network member retains full discretion in deciding whether or not to investigate.¹³⁸ As a result, if the binding effect proposal were adopted, NCA decisions would be binding on courts, but not on fellow NCAs. Under Art.13 of the Modernisation Regulation, the fact that one NCA is investigating is sufficient grounds for another to suspend proceedings or to reject a complaint. However, it has "no obligation to do so".¹³⁹

The summary of responses on the White paper on the reform of Regulation 17, which eventually became the proposal for Regulation 1/2003, gives an indication of how territorial effect of NCA decisions was perceived at the time.¹⁴⁰ Only five Member States responded specifically on this point. Of those, three agreed that NCA decisions should have binding effect throughout the EU, and the other two were opposed. Not surprisingly, firms and their legal representatives were more in favour of EU-wide effect on the grounds of legal certainty. A number did propose a rule in which fellow NCAs and the European Commission would have a deadline for objecting to an NCA's decision, after which if no

¹³⁷ To notify the Commission and other Member States at the opening of the first investigative procedure 11(3), and 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 (11(4))

¹³⁸ Commission Notice on cooperation within the Network of Competition Authorities OJ C 101, 27.4.2004, 43-53 [5]. The Notice sets out rules for case allocation, cooperation and consistent application of the EU antitrust rules between Member States' competition authorities and the Directorate General for Competition of the European Commission.

¹³⁹ Network Notice [22]

¹⁴⁰ http://ec.europa.eu/competition/antitrust/others/wp_on_modernisation/summary_observations.html (last accessed 16.8.2012)

objection were raised that decision would automatically be effective throughout the EU. (It must be remembered that this consultation took place before the rules of the European Competition Network were fully in place.) This would be salient, for example, where, based on EU as well as national law, the NCA in Member State A investigated and imposed fines on cartel members X and Y in Member State A; meanwhile the NCA in Member State B started proceedings against firm Z, a member of the same cartel. The NCA in MS B then proposed a finding of no infringement. This would undermine enforcement.

However, the provisions of Regulation 1/2003 and its accompanying Network Notice¹⁴¹ were drafted so that positive decisions at national level cannot have a binding effect on other Member State NCAs. Clearly the current proposal for binding effect on courts was not envisaged at the time Regulation 1/2003 was drafted. In the Commission's explanatory memorandum for the proposal which became the Regulation 1/2003, it stated that: "If the competition authority of a Member State finds that behaviour, acting on a complaint or on its own initiative does not infringe Article [101] as a whole or Article [102], it can close the proceedings or reject the complaint by decision, finding that there are no grounds for action. Such decisions bind only the authority adopting the decision. *The effect of other types of decisions adopted by the national competition authorities within their own Member State is not regulated in the proposed Regulation. This is a matter of national law. Decisions adopted by national competition authorities do not have legal effects outside the territory of their Member State, nor do they bind the Commission*".¹⁴² (emphasis added) This provision limits itself to the types of decisions which NCAs have the competence to deliver under Article 5 Reg 1/2003.¹⁴³ In other words, non-infringement decisions are effective only on the territory of the Member State of the NCA which makes it, and not throughout the EU. One NCA cannot prevent another NCA from subsequently finding an infringement of Article 101 or 102 TFEU in respect of its own territory. Only the Commission, under Article 10 Regulation 1/2003, is competent to make a finding that the

¹⁴¹ Notice on co-operation within the Network of Competition Authorities [2004] OJ C101/43

¹⁴² Explanatory Memorandum accompanying the Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 ("Regulation implementing Articles 81 and 82 of the Treaty"), COM (2000) 582 final - 2000/0243 (CNS), [2000] OJ C 365E/284, 16-17

¹⁴³ These are: requiring that an infringement be brought to an end; ordering interim measures; accepting commitments; imposing fines, periodic penalty payments or any other penalty provided for in their national law. The Commission's staff working paper [152]-[153] explicitly gives Art 5 Reg 1/2003 as a reason for excluding other types of decisions

EU competition rules are inapplicable in a given case which binds NCAs and national courts.¹⁴⁴

Given the case allocation rules within the ECN,¹⁴⁵ ideally a single NCA or a lead authority should adopt a decision, but there is no guarantee that the ECN will continue to work in this way. It is conceivable that several NCAs within the ECN could be investigating the same conduct, and may adopt different decisions. If strongly divergent decisions were envisaged, for example, one finding an infringement and one finding no infringement affecting trade between Member States (as opposed to only in the national market), or differing as to the degree (fault, effects) of the infringement, the Commission would need to intervene and possibly take over the case as foreseen under Art.11(6) Reg 1/2003. It could be expected that a defendant would raise any finding of no infringement as evidence, and divergent decisions would require the civil court to investigate the facts of the alleged infringement.

Member State NCA decisions are notified first through the ECN, so all NCAs would have had the opportunity to raise objections or risks of divergence after an NCA had notified its envisaged decision to the other members of the ECN as required under Art.11(4) Reg 1/2003. However, there would have been no court input at that stage except where a court was designated as an NCA in a public enforcement role. In order for a court to be bound, it would need to know about the existence of a relevant decision. The court would be dependent on the parties, or an intervening NCA, to bring such a decision to the court's attention. What if a court does not know about an NCA decision in another Member State and goes ahead and makes a potentially divergent judgment? Could a litigant raise it later pleading a change of circumstances, therefore leaving the court decision uncertain and vulnerable to appeal?¹⁴⁶ There are implications here for the principle of *res judicata*, and the point at which a decision becomes 'final' and therefore binding. Further litigation to establish the scope and application of foreign NCAs' decisions could also arise as an unintended consequence of the binding effect rule.

If NCAs in different Member States are not formally bound by each other's decisions, there is an asymmetry and a consistency gap if national judges are to be bound by the decisions

¹⁴⁴ see Commission staff working paper accompanying the report on functioning of Reg 1 SEC (2009) 574, p. 36

¹⁴⁵ This is based on the notion of the 'well-placed to act' authority: [5]-[15] of the Network Notice

¹⁴⁶ C-453/00 *Kuehne & Heitz* [2004] ECR I-837 concerned the obligation to re-examine final administrative decisions adopted in violation of subsequent EU law and confirmed by a national court. Importantly, the case places obligations on administrative bodies to reopen their decisions, rather than courts.

of foreign NCAs. Time will tell whether the softer cooperation mechanisms of the European Competition Network compensate for this lack of hard binding effect.

7.1 Reverse principle of equivalence?

According to the principle of equivalence national procedural rules governing actions to ensure the protection of individual rights under EU law should not be subject to *less* favourable conditions than those governing similar actions under domestic law.¹⁴⁷

At least half of the Member States do not provide for their national courts being bound by decisions of their own NCAs. It would be strange if national courts were bound by decisions of the Commission and foreign NCAs, but not their domestic authority. Domestic law would have to bridge this anomaly. Imposing the option of binding effect of an NCA decision in the domestic context only in the courts of that Member State is likely to be met with resistance on the grounds of subsidiarity and national procedural autonomy. By allowing complainants to rely on an infringement finding by a foreign NCA, the binding effect rule actually discriminates in *favour* of claims based on EU rules through decisions from other Member States.

Taking the example of the UK, in a 2007 report on private actions, the Office of Fair Trading recommends the insertion of a provision into the Competition Act 1998 requiring UK courts and tribunals to “have regard to” the UK competition authorities’ decisions and guidance when determining competition issues. It specifically recommends that courts should merely “have regard” to UK NCAs’ decisions and guidance, not proposing that courts be bound, but only that they “give serious consideration” to the decision.¹⁴⁸ Without fettering judge’s jurisdiction, where judges depart from a policy statement or decision “It is important that departures or differences by UK NCAs are adequately explained in the interests of legal certainty” particularly reconciling different precedents.¹⁴⁹ However, oddly in a separate part of the same report the OFT does support binding effect of other Member State NCAs’ decisions, which it states is best achieved at the EU level.¹⁵⁰

¹⁴⁷ Case 33/76 *Rewe Zentralfinanz eG v Landwirtschaftskammer fur das Saarland* [1976] ECR 1989

¹⁴⁸ ‘Private actions in competition law: effective redress for consumers and business: recommendations from the Office of Fair Trading’, OFT916resp, November 2007, p.41, [10.6]-[10.7].

¹⁴⁹ OFT recommendations [10.7]

¹⁵⁰ OFT recommendations [12.6]-[12.7] This apparently contradictory position is a source of confusion – in its response to the White Paper on damages actions the OFT fully supports the binding effect proposal,

As Van Gerven argues in a more general discussion of the principle of equivalence, “National courts may feel the need to undo...‘reverse discrimination’ in favour of Community rights, by improving judicial protection given to purely national rights.”¹⁵¹ This could of course be a good thing for complainants. But the consequences could be unevenness of the status of certain bodies’ decisions in competition law relative to other policy areas. A similar point is made in the European Parliament’s resolution on the White Paper: EU measures “must not lead to arbitrary or unnecessary fragmentation of procedural national laws”.¹⁵²

Even absent the binding effect rule in the draft directive, as a consequence of a horizontal duty of loyal cooperation it could be argued that the principle of equivalence requires a horizontal cross-border binding effect. That is, if a Member State allows binding effect of its own NCA decisions on its own civil courts, must it afford decisions from other NCAs the same status where those decisions are based on EU competition rules? So far Germany is the only country where decisions of foreign NCAs are binding (section 33(4) Act Against Restraints on Competition).

The figure below shows asymmetric national and cross-border effects of the binding effect rule effects with reference to two Member States. In Member State 1, NCA 1’s decisions are binding on the courts in its own Member State, and by virtue of the EU-level binding effect rule. In Member State 2, the courts are bound by the decisions of NCA 1 by virtue of the EU rule, but not by decisions of NCA 2 in their own Member State.

but Allen & Overy, among others “urge[s] adopting a similar approach to that in the OFT’s Recommendations, requiring national courts to have regard to decisions of NCAs without being bound to follow them.”

¹⁵¹ W Van Gerven, ‘Of Rights, Remedies and Procedures’ (2000) 37 *Common Market Law Review* 501-536, 534; the Nederlandse Raad voor de rechtspraak, Dutch Council for the Judiciary also makes this point in its response to the White Paper

¹⁵² European Parliament resolution of 26 March 2009 on the White Paper on damages actions for breach of the EC antitrust rules (2008/2154(INI)) P6_TA(2009)0187

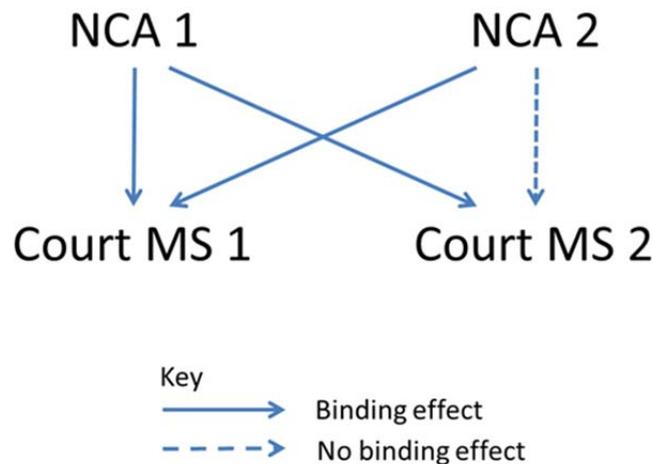


Fig 3 : Asymmetric national and cross-border effect of the binding effect rule

8. The possibility of the binding effect proposal

Having analysed the elements of the binding effect proposal and its implications, this section addresses the possibility of the rule becoming effective across the Union. It first lays out the current legal effect on civil courts of national competition authority decisions in different Member States to assess the work that needs to be done. This is done through consideration of Member State competition law statutes, the 2004 Ashurst Comparative Study (now somewhat out of date),¹⁵³ submissions to the European Commission's consultation on the White Paper on damages actions, the FIDE XXIV Congress 2010 country reports on topic 2: the judicial application of European competition law¹⁵⁴, and an

¹⁵³ Ashurst report: 'Study on the conditions of claims for damages in case of infringement of EC competition rules' Comparative report prepared by Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, 31 August 2004, including national reports, available at <http://ec.europa.eu/competition/antitrust/actionsdamages/study.html>

¹⁵⁴ 16 Member States' reports were available as at 20.7.2010, at: http://www.fide2010.eu/index.php?option=com_content&view=article&id=58&Itemid=71&lang=en, accessed 20.7.2010. Now published as G C Rodriguez Iglesias & L Ortiz Blanco (eds) 'The Judicial Application of Competition Law' Proceedings of the FIDE XXIV Congress Madrid 2010 Vol 2 (Servicio de Publicaciones de la Facultad de Derecho, Complutense University, Madrid 2010). Questions 9, 10, 11, 12, 13, 15 are relevant: e.g. Q9: 'Has the national court to stay its proceedings once the national competition authority (NCA) has initiated proceedings on the same matter, until a decision has been reached?'. Q10: 'Has the NCA to stay its proceedings once a national court has initiated proceedings on the same matter, until a decision has been reached?', Q11: 'Are national courts bound by the final decisions adopted by a NCA declaring that a certain practice amounts to an infringement? Is the response the same where the NCA rules that the practice does not infringe competition law?', Q12: 'Is the NCA bound by the final decisions adopted by a national court declaring that a certain practice amounts to an infringement? Is the response the same where the national court rules that the practice does not infringe competition law?', Q13: 'If not [see Q12], what is the value for a national court of a final decision adopted by a NCA and vice versa?', Q15: 'Does your legal/constitutional system allow courts to be bound

independent study recently prepared for the European Parliament on Collective Redress in Antitrust. These reports do not all agree with each other, as most rely on individual rapporteurs,¹⁵⁵ but they give an indication of how the rule would play out in practice and amendments that would need to be made to national laws. Secondly, this section evaluates the obstacles to the binding effect rule being adopted, in particular the objections on constitutional grounds, which will be the most difficult to surmount. Finally, this section considers the current state of play of the draft legislation on damages actions which contains the binding effect proposal, including the discussion on its Treaty legal base.

8.1 Current legal effect of NCA decisions

All Member States provide for decisions of national competition authorities to be submitted as evidence in civil court proceedings.¹⁵⁶ However, these decisions or other evidence from competition authorities are not considered binding in all Member States. It may only be one element among other types of evidence that the judge can take into account; it may be a particularly persuasive piece of evidence, either legally or in practice; the decision may give rise to a rebuttable presumption of (non-)infringement, open to the other party to challenge with their own evidence; the national competition authority's decision may be formally binding, leaving no room to reopen an investigation into the finding of infringement; or even foreign NCA decisions may be binding on a court in the 'home' Member State.¹⁵⁷ As such there are different degrees of persuasiveness in the Member States. In some cases it also depends on the type of decision (e.g. non-infringement as well as infringement), and, where several bodies are designated NCAs, which of those bodies made the decision.

by administrative decisions – as provided for in Article 16 of Regulation 1/2003 in respect to the Commission's decisions? In the absence of a specific legal provision such as Article 16... what is or could be the value for a national court of a final decision adopted by a NCA of [an]other Member State? And of a judgment of the court of another Member State?

¹⁵⁵ This may also reflect the difference between law in statute and court practice, and changes in legislation.

¹⁵⁶ See Ashurst Study, 69

¹⁵⁷ See the independent study prepared by Lear for the European Parliament's Economic and Monetary Affairs Committee, 'Collective Redress in Antitrust', IP/A/ECON/ST/2011-19, PE 475.120, 12.6.2012, 24-25

8.1.1 Binding effect of foreign NCA decisions

The only Member State currently to allow the binding effect of *foreign* NCA decisions is Germany¹⁵⁸ under s.33(4) of the Act against Restraints of Competition¹⁵⁹, a provision which the Commission has clearly drawn upon in its drafting of the White Paper proposal. The German experience could provide a useful indication of how the rule would work in practice. However, so far there appear to have been no cases relying on a foreign NCA decision.¹⁶⁰ Section 33(4) of the German Act against Restraints of Competition does not limit binding effect of administrative decisions to claims against parties addressed by the decision. Wurmnest suggests that in practice German judges may interpret the provision narrowly to limit binding effect to decisions where the defendants were addressees of the foreign NCA decision or have had the right to be heard.¹⁶¹

8.1.2 Binding effect of domestic NCA/administrative decisions

Some Member States allow for the binding effect of decisions of their domestic NCAs. Article 88B of the Hungarian Competition Act provides that any statement on the existence *or absence* of an infringement made in a decision of the Hungarian Competition Authority shall be binding on a court hearing a related lawsuit. In the Czech Republic, the courts are

¹⁵⁸ The Lear study for the European Parliament, p. 25, claims that Sweden also allows for binding effect of foreign NCA decisions, but gives no precise source. The FIDE 2010 report explains that such a proposal would be against the Swedish Constitution according to the Instrument of Government Section 11:2 and 11:7: “[n]o public authority, including the Swedish Parliament, may determine how a court of law is to adjudicate an individual case or otherwise apply a rule of law in a particular case”. (The Instrument of Government, Section 11:2). Similarly, “[n]o public authority may determine how an administrative authority is to decide in a particular case involving the exercise of public authority vis-à-vis a private subject or a local authority, or the application of law”(The Instrument of Government, Section 11:7).. Consequently, the proposal in the White Paper as regards the binding effect of National Competition Authorities’ decisions upon the judiciary are incompatible with the Swedish Constitution, and would thus require a constitutional reform to be implemented in Sweden.”

¹⁵⁹ “Where damages are claimed for an infringement of a provision of this Act or of Article 81 or 82 of the EC Treaty, the court shall be bound by a finding that an infringement has occurred, to the extent such a finding was made in a final decision by the cartel authority, the Commission of the European Community, or the competition authority - or court acting as such - in another Member State of the European Community. The same applies to such findings in final judgments resulting from appeals against decisions pursuant to sentence 1. Pursuant to Article 16(1), sentence 4 of Regulation (EC) No. 1/2003 this obligation applies without prejudice to the rights and obligations under Article 234 of the EC Treaty.” 7th Amendment 2005 of the Gesetz gegen Wettbewerbsbeschränkungen, (GWB). English version available at

http://www.bundeskartellamt.de/wEnglisch/download/pdf/GWB/0911_GWB_7_Novelle_E.pdf . The most recent 8th Amendment was adopted in March 2012.

¹⁶⁰ Informally confirmed by S Peyer

¹⁶¹ W Wurmnest ‘A New Era for Private Antitrust Litigation in Germany? A Critical Appraisal of the Modernized Law against Restraints of Competition’ (2005) 6(8) *German Law Journal* 1173

bound by administrative decisions (not only in competition) finding an administrative offence (art 135(1) Civil Procedure Code)¹⁶². Infringement decisions are not binding but the court should give reasons if it deviates (art 135(2)). In Austria, both infringement and non-infringement decisions of the Cartel Court are binding on the court deciding on the damages claim where the parties and the facts are identical.¹⁶³ In Estonia decisions are binding regarding the act and the infringer in criminal and administrative offences, but the facts and reasoning are not binding otherwise. Other Member States in which infringement decisions are binding are Greece, Poland, Slovenia and Sweden (these two only regarding individual exemption decisions).¹⁶⁴

In the UK, Section 58A of the Competition Act 1998¹⁶⁵ makes findings of infringement by regulators and the CAT binding on civil courts, again once appeals have been exhausted. Section 58A provides that where a follow-on damages claim is brought in the High Court, the court is bound (subsection (2)) by an infringement decision of the OFT or the CAT (subsection (3)) when it becomes final.¹⁶⁶ Section 58, meanwhile, provides that any finding of fact by the OFT which is “relevant to an issue arising in [competition law] proceedings [before the court] is binding on the parties”, unless the court otherwise directs.

This wording of section 58 is clearly broader than that of 58A in several ways: ‘relevant to an issue arising in proceedings’ is broader than a fact material to the finding of infringement; findings of fact are binding on the parties rather than the court; and the court has discretion in directing that those findings of fact are not binding. It has been suggested that this discretion would likely be exercised “in circumstances where the party concerned has not had a proper opportunity to test the evidence on which the finding of fact was made.”¹⁶⁷ This echoes the German example above.

The question of precisely which part of the decision is binding was raised in passing in the first private enforcement case to go to full hearing before the CAT, and subsequently to the Court of Appeal on the basis of damages, *Enron Coal Services (in liquidation) v English*,

¹⁶² FIDE 2010 proceedings

¹⁶³ FIDE 2010 proceedings

¹⁶⁴ Ashurst study, 69-70

¹⁶⁵ Introduced by section 20 of the UK Enterprise Act 2002

¹⁶⁶ Limitation periods in subsection (4)

¹⁶⁷ C Brown and D Ryan, UK country report for FIDE Congress 2010, available at http://www.ukael.org/associates_21_2528442727.pdf, p 10 fn 62

Scottish and Welsh Railways Limited.¹⁶⁸ This touched on the extent to which the CAT is bound by findings of fact contained in an infringement decision, as opposed to only the finding of infringement itself. The parties disagreed on whether the Office of the Rail Regulator's decision had found the defendant to have overcharged causing loss to the claimant, on which the claimant based its claim for damages. For the CAT to entertain a claim, there had to be a decision of a regulator of the kind in section 47A(6), which in turn would be binding upon the CAT. The Court of Appeal took a restrictive approach. Patten LJ stated:

"The use of the word 'decision' makes it clear that s.47A is differentiating between findings of fact as to the conduct of the defendant made as part of the overall decision and a determination by the regulator that particular conduct amounts to an infringement of the Chapter II prohibition [the domestic equivalent of Article 102 TFEU on abuse of dominance]. It is not open to a claimant... to seek to recover damages through the medium of s.47A simply by identifying findings of fact which could *arguably* amount to such an infringement."¹⁶⁹ (emphasis added). This seems to suggest that for a finding of fact to be binding, it would have to be material to the finding of infringement.

There is no rule requiring the civil courts to take into account OFT, that is domestic, decisions which do not involve the same parties and conduct. However, relevant decisions and statements of the Commission are to be taken into account, even when courts are applying only domestic law, as laid down in Section 60(3) Competition Act 1998. "in practice, however, courts do take into account relevant decisions of the OFT in much the same way as they have regard to relevant decisions of the Commission."¹⁷⁰ Non-infringement decisions are not explicitly mentioned in the UK Competition Act, but are also likely to be persuasive where a court is hearing a damages action based on the same conduct.

¹⁶⁸ [2009] EWCA Civ 647. On 1 July 2009, the Court of Appeal upheld an appeal against a judgment of the CAT by English Welsh & Scottish Railway Limited (EWS) that partly refused an application by EWS to strike out part of the damages claim brought by Enron Coal Services Limited.

¹⁶⁹ Enron [31]

¹⁷⁰ C Brown and D Ryan FIDE 2010 report, p. 10, fn 64

8.1.3 Persuasive/evidential value of domestic NCA decisions

In other Member States, NCA findings of infringement are treated as particularly persuasive, but technically rebuttable e.g. Belgium, Lithuania, Malta, Cyprus, Latvia, Denmark, Italy, Finland, France, Poland. In still others, the NCA's decision is just another piece of evidence to be taken into account e.g. in Portugal pursuant to Articles 671 and 674 of the Portuguese Procedural Code¹⁷¹; Spain where there is no requirement to have regard to the NCA's decision, and decisions of administrative authorities in general have no binding effect on civil courts; in Luxembourg it would depend on the "strength and nature of reasoning"¹⁷²; and in Sweden it would be evidence only regarding decisions other than individual exemptions.

8.1.4 Reform to constitutions needed

Of course, the Commission cannot adopt the binding effect rule without support from the Member States. Responses to the White Paper consultation¹⁷³ suggest that its passage will be difficult - several contributions strongly state that to bring the proposed rule into effect would require constitutional change, as it is against the fundamental notion of judicial independence and lack of hierarchy of administrative institutions over the judiciary.¹⁷⁴ There is also the problem of different standards of appeal and judicial review in Member States. Others argue that as a prerequisite for the binding effect rule more work needs to be done within the ECN on the mutual recognition of decisions and harmonising rules of procedure before NCAs.¹⁷⁵

¹⁷¹ Ashurst Study, 69-70. However, according to the FIDE Portugal country report 2010, "A final decision adopted by an NCA, *with the same value than a judgment in the country where it was issued*, must be considered by the Portuguese Courts as if it was a decision from a foreign court." (response to Q15). This raises the question of whether decisions from Member States with courts designated as competition authorities (e.g. Ireland) would be favoured.

¹⁷² FIDE 2010 country report

¹⁷³ available at

http://ec.europa.eu/comm/competition/antitrust/actionsdamages/white_paper_comments.html .

¹⁷⁴ Very few judges or courts made direct representations to the White Paper consultation. Exceptions were the Association of European Competition Law Judges (AECLJ) and the Italian Supreme Court. It was a similar situation in the context of the 2004 reforms: one judge noted that German judges took no active part in the discussions. The principals were the European Commission, Bundeskartellamt, Monopolkommission and academics – comment of J Gröning in C-D Ehlermann (ed) *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Hart, 2001), 487

¹⁷⁵ Addleshaw Goddard, AFEC, Association Française d'Etude de la Concurrence; APDC Association des Avocats Pratiquant le Droit de la Concurrence; UK Competition Law Association; Slaughter & May

The constitutional barriers will be most difficult to overcome. Examples include France – opponents of the proposal draw attention to the judicial independence principle in Art 64 of the French constitution.¹⁷⁶ According to the Portuguese Competition Authority, there would also be constitutional obstacles in Portugal based on separation of powers and independence of the judiciary, meaning that an NCA decision would need to be actively confirmed by a court.¹⁷⁷ In Sweden, “[n]o public authority, including the Swedish Parliament, may determine how a court of law is to adjudicate an individual case or otherwise apply a rule of law in a particular case”.¹⁷⁸

The first unofficial version of the draft directive on antitrust damages actions redrafts the rule in Article 12: “Where national courts rule, in actions for damages, on agreements, decisions or practices under Article [101 or 102] of the Treaty which are already the subject of a final infringement decision by a national competition authority or by a review court, Member States shall ensure that the national courts cannot take decisions running counter to such infringement decision. This obligation is without prejudice to the rights and obligations under Article [267] of the Treaty.”¹⁷⁹ The fact that the Article is entitled ‘Effect of national decisions’ without the use of the word ‘binding’ suggests that the Commission is aware of the controversies. In addition, the reference to the ECN is played down and more emphasis is placed on the role of review courts.

Another possibility would be to create an irrebuttable presumption, which in practice has the same ‘binding’ effect, but semantically respects the independence of the court to make a finding.¹⁸⁰

9. The current state of play of legislation on damages actions

Following the consultation on the White Paper in 2008-2009, the draft directive on damages actions was due to be proposed by the Commission in October 2009.¹⁸¹ However,

¹⁷⁶ Association des Avocats Pratiquant le Droit de la Concurrence White Paper response, p 12. French constitution of 4 October 1958

¹⁷⁷ Autoridade da Concorrência Portuguesa response to White Paper on damages actions

¹⁷⁸ The Instrument of Government, Section 11:2, as reported in FIDE 2010 country report

¹⁷⁹ Reported in Truli, 801

¹⁸⁰ Italian Supreme Court Corte Suprema di Cassazione and Luxembourg Competition Authority, Conseil de la Concurrence and Inspection de la Concurrence responses to the White Paper on damages action: Out of respect for separation of powers it is not advisable to use ‘binding’ but “présomption irréfragable, présomption par laquelle le juge et les parties seront liés”

the proposal was delayed until the new College of Commissioners had taken office due to objections from the European Parliament in a resolution of March 2009, largely on the lack of legal base and insistence on its involvement in the legislative procedure.¹⁸²

The EP resolution specifically addresses comments on the binding effect of NCA decisions, but is ambiguous. It states that a national court should *not* be bound by a decision of the national competition authority – but this is without prejudice to rules that provide for binding effect of a decision applying Article 101 or 102 TFEU relating to the same subject matter adopted by a member of the European Competition Network. The second part, recommending training and exchange programmes to encourage acceptance of *another* NCA's decision, suggests that the Parliament is referring to the effect of decisions between NCAs, not on civil courts.¹⁸³ The reference to training and exchange programmes also suggests soft convergence rather than hard binding rules.

The draft directive on actions for damages for breaches of antitrust law now features in the European Commission's work programme for 2012, explaining that "The objective of this legislative initiative would be to ensure effective damages actions before national courts for breaches of EU antitrust rules and to clarify the interrelation of such private actions with public enforcement by the Commission and the national competition authorities, notably as regards the protection of leniency programmes, in order to preserve the central role of public enforcement in the EU. The right of victims of antitrust infringements to such damages has already been established by the Court."¹⁸⁴ The directive is due to be proposed in the fourth quarter of 2012. The work programme states it will progress under the ordinary legislative procedure, which means that the European

¹⁸¹ See e.g. 'Plans for Private Antitrust Damages Actions Directive Suffer Setback' <http://www.internationallawoffice.com/newsletters/Detail.aspx?g=71e1fd5c-7f47-40a1-9a8f-951fe751fb5d> last accessed 10.8.2012

¹⁸² European Parliament resolution of 26 March 2009 on the White Paper on damages actions for breach of the EC antitrust rules (2008/2154(INI)) P6_TA(2009)0187. Objections to no legal base [2], requesting co-decision (now known as ordinary legislative procedure post-Lisbon) [5].

¹⁸³ European Parliament March 2009 resolution [14]

¹⁸⁴ The 2012 work programme was released on 25.11.2011, available at http://ec.europa.eu/atwork/key-documents/index_en.htm. See also Joaquín Almunia Vice President of the European Commission responsible for Competition Policy Work Programme for 2012 Presentation at ECON, European Parliament 22 November 2011, SPEECH/11/785, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/785&format=HTML&aged=0&language=EN&guiLanguage=en>. The content of the work programme is in its annex: Annex to the Communication from the Commission to the European parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission Work Programme 2012 COM(2011) 777 final, Brussels, 15.11.2011 available at http://ec.europa.eu/atwork/pdf/cwp2012_annex_en.pdf, last accessed 10.8.2012, p. 3

Parliament will have a greater role in the legislation's passage than mere consultation. However, the precise legal base is "still to be determined".¹⁸⁵

The roadmap on antitrust damages actions links this legislative proposal directly to action on collective redress more broadly in other types of claims.¹⁸⁶ Any action on collective redress will take a horizontal approach across policy areas, and is jointly championed by the Commission Directorates General of Justice; Competition; and Health and Consumer Policy. A communication is due around the same time as the draft directive on damages actions, with the possibility of further legislative or non-legislative action based on the Treaty on the European Union (TEU).¹⁸⁷ The linking of these two initiatives may help to address concerns raised by the European Parliament and by respondents to the White Paper consultation about the fragmentation of national procedural law by treating competition as a 'special' policy area.¹⁸⁸

The view of the European Parliament is important as the draft legislation will be adopted under the ordinary legislative procedure, according to the Commission's work programme. This suggests that Art 103 TFEU, the legal base for antitrust only provisions, will not be the only basis, as that operates under the special legislative procedure, in which

¹⁸⁵ http://ec.europa.eu/atwork/pdf/forward_programming_2012.pdf (last accessed 9.8.2012)

Commission actions expected to be adopted 18/07/2012 - 31/12/2012.:2009/COMP/023 Proposal for a Directive on rules governing actions for damages for infringements of the competition law provisions. Interestingly, the description of the legislation now opens with the sentence about the CJEU establishing the right to compensation, perhaps to underline its existing jurisprudential basis.

¹⁸⁶ http://ec.europa.eu/governance/impact/planned_ia/docs/2009_comp_023_damages_breaches_antitrust_en.pdf, last accessed 10.8.2012

¹⁸⁷ Commission work programme 2012 annex, 20: 2012/JUST+/017 Communication on general principles of the EU framework for collective redress "The potential initiative will ensure that the European approach to collective redress is coherent and consistent. It will be a horizontal initiative covering several policy areas. The aim of the initiative is to improve the enforcement of EU law and access to justice for citizens and companies in situations where shortcomings exist under the status quo. Depending on the policy option chosen, it will take the form of legislative or non-legislative action."

¹⁸⁸ See for example Nederlandse Kabinet – Dutch government, including Dutch competition authority - response to White Paper on damages actions; European Parliament March 2009 resolution [6]. The Parliament adopted a further resolution in response to the Commission's collective redress consultation on 2.2.2012: European Parliament resolution of 2 February 2012 on 'Towards a Coherent European Approach to Collective Redress' (2011/2089(INI)) P7_TA(2012)0021, available at <http://www.europarl.europa.eu/oeil/FindByProcnum.do?lang=en&procnum=INI/2011/2089> (accessed 11.8.2012). Since this resolution the Parliament's Economic and Monetary Affairs Committee has commissioned an independent study, 'Collective Redress in Antitrust' European Parliament Directorate-General for Internal Policies, Policy Department A: Economic And Scientific Policy 'Collective Redress in Antitrust' IP/A/ECON/ST/2011-19, PE 475.120, 12.6.2012, available at <http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=74351> (accessed 11.8.2012) which strongly suggests that decisions should be binding on courts (81, 90). The report also proposes limiting the exposure of leniency applicants to damages claims, and requiring claimants to notify their claim to the relevant NCA when they begin an action in a civil court, which would allow, but not oblige, an NCA to intervene (14, 90). It also supports a regulation rather than a directive (12). However, this is not an adopted report of the Parliament itself.

the European Parliament has only a consultative role. Art 103 could be justified on the grounds that the Court of Justice has recognised the right to claim damages for harm caused by breach of Art 101 and 102 TFEU, and that legislation is needed to give full effect to that right. However, given the consequences for national procedural rules more broadly, it may be used in conjunction with other Treaty articles.¹⁸⁹

If a horizontal approach is taken, incorporating collective redress and measures for other consumer-related actions, this gives more weight to other legal bases. These would most likely be Article 81 TFEU¹⁹⁰ on judicial cooperation in civil matters, and Article 114¹⁹¹ on approximation of laws. Art 169 TFEU on consumer protection could also be used. It seems highly unlikely that the proposal could be based on these different articles only, without Article 103 TFEU, given that competition law is the focus of the proposal. A mix of legal bases could also give rise to competence disputes as Articles 81, 114 and 169 require the ordinary legislative procedure, involving co-decision between Council and Parliament, whereas Art 103 only requires a consultative role for the Parliament under the special legislative procedure.

From the perspective of institutional balance, Art 103(d) refers to antitrust legislation defining respective functions of the Commission and the Court of Justice for the purposes of applying Articles 101 and 102 TFEU. However, it is doubtful whether this provision can be used as a basis for determination of the relationship between administrative and judicial power at the national level.¹⁹²

¹⁸⁹ See C Leskinen ‘The Competence of the European Union to Adopt Measures Harmonizing the Procedural Rules Governing EC Antitrust Damages Action’ (2008) Working Paper Instituto de Empresa Law School, Madrid for a discussion of potential legal bases and C Leskinen ‘Antitrust Damages Actions: Recent Developments’

<http://blogeuropa.eu/2009/05/13/antitrust-damages-actions-recent-developments/#more-503> 13.5.2009

¹⁹⁰ “1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.” In particular (f): “the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States”; (a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases; (e) effective access to justice

¹⁹¹ “Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26 [ensuring the functioning of the internal market]”

¹⁹² See, to this effect, Irish Department of Enterprise, Trade and Employment response to White Paper on damages actions.

10. Conclusions

This chapter has explored the proposal for the binding effect of national competition authority decisions on civil courts throughout the EU. This rule is proposed to incentivise claimants to bring private enforcement cases in civil courts by alleviating their burden to prove an infringement. The rule would also avoid re-litigation of issues in public and private enforcement, and could contribute to consistent application of the EU competition rules by indirectly linking national courts to the European Competition Network (ECN). The binding effect rule could also link civil courts enforcing competition rules between private parties with the European Competition Network through *amicus curiae* interventions, as explored in the previous chapter. NCAs could be called upon by a court to assist if more explanation of a finding of infringement were needed.

However, such a proposal carries much broader constitutional significance in terms of the interaction between judicial and administrative institutions and their decisions. The proposed rule creates an apparent hierarchy of administrative decisions over court judgments, narrowing the field of civil courts' jurisdiction and limiting judicial autonomy. It also implies a certain burden on judges: that civil courts must be aware of all NCA infringement decisions throughout EU - and show that they are taken into account in their reasoning.

My original research into the legislative process behind Reg 1/2003 informs this chapter in respect of the horizontal relations between national competition authorities within the European Competition Network, and the effect of Commission decisions on national courts. Drawing on this research the chapter has shown the asymmetric effects deriving from the status of civil courts and national competition authorities. NCA decisions would be binding on national courts, but there would be no similar horizontal binding effect on fellow NCAs within the European Competition Network. The assumption is that a hard rule binding NCAs with each other's decisions is not needed given the cooperation rules within the ECN, but there is no guarantee that the ECN will continue to operate according to these rules. There are also uneven effects concerning Member States courts being bound by decisions of a foreign NCA but not by those of the domestic NCA.

The explicit basis for the binding effect rule is an extension of *Masterfoods* codified in Art 16 Reg 1/2003, which obliges EU Member State courts not to make a ruling running counter to one made or contemplated by the European Commission. This chapter has

considered the different understandings of *Masterfoods*, as a positive obligation, or as a negative duty of abstention. Commission decisions derive their effect by virtue of supremacy of EU law, but the basis of extension to binding effect of foreign administrative decisions in EU law less clear. The binding effect rule could be understood as a delegation, or devolution, of the Commission's enforcement powers. But if national courts are also EU courts, national judge's interpretation of EU law is as valid as the Commission's, and by extension an NCA's.

There is an analogy with the Brussels I Regulation on jurisdiction and recognition of judgments between Member States. The binding effect rule should have at least the same safeguards as Art 34(1) Brussels Reg, which would allow a civil court to look behind an authority's decisions in exceptional circumstances. If this were not the case, decisions of administrative bodies would be afforded a privileged position relative to judgments of civil courts. However, questioning other Member States' compatibility with fair legal process standards may undermine trust currently fostered in the ECN. Binding effect should be employed only where the defendants in the follow-on action were heard in proceedings leading to the foreign NCA decision – if not addressees of the decision at least as participants.

Currently the only Member State to impose the binding effect of foreign NCA decisions is Germany. In a number of Member States there are constitutional obstacles to the rule being adopted based on respect for the principle of judicial autonomy. One way around this may be a semantic one – packaging the finding of infringement as an 'irrebuttable presumption' as at least symbolic gesture to independence of the judiciary. In particular, the word 'binding' should be avoided, drawing upon the interpretations of *Masterfoods*. This uncertainty could however lead to satellite litigation to determine the precise effect of a foreign NCA decision in individual cases.

By looking comprehensively into the consultative process behind the proposed binding effect rule through responses to the White Paper on damages actions, the chapter also identified resistance to adoption of the rule and obstacles in the Member States.

As also shown in chapter 4 on Commission intervention in national court proceedings, there are trade-offs between judicial autonomy and effective enforcement of EU competition law, and effective enforcement takes priority. This contributes to an institutional hierarchy of administrative authorities, carrying out public competition law

enforcement, over civil courts. This *EU* proposal will affect institutional interactions between administrative authorities and courts at the *national* level, with potential impact beyond competition law enforcement.

CHAPTER 6: CONCLUSIONS AND DIRECTIONS FOR FURTHER RESEARCH

This thesis explored the constitutional implications of interaction between courts and administrative authorities, between the supranational and national levels, in EU competition law enforcement. With a focus on the role of courts, it considered the impact of the 2004 and more recent competition reforms on national courts and judicial autonomy. In so doing it investigated how the European Commission can impact on judicial decision-making at the national level, and to what extent the European Commission challenges, or complements, the judicial role of the Court of Justice of the European Union in the interpretation of competition law. The thesis also considered how the interaction of different mechanisms for coherent interpretation and application of EU competition law impacts on the relationship between judicial and administrative authorities. The thesis revealed asymmetric effects deriving from the different constitutional statuses of courts and administrative public authorities.

From a theoretical perspective, the thesis took forward the understanding of the relatively new concept of interpretative pluralism. The thesis confirms Maduro's suggestion that courts do not have a monopoly on the interpretation of the law. However, contrary to his idea, one institution does need to have the 'last word'. It also takes forward Komarek's call for research into courts' deference to administrative agencies' interpretation of the law. If there is an institutional hierarchy of administrative/executive agencies over courts, then this challenges the institutional balance and judicial autonomy at the national level.

Contributing to this theoretical contribution, the thesis investigated the emerging practice in the post-2004 regime. This was evident in the contrast between chapter 3 on NCAs' apparent lack of access to the CJEU, and chapter 4 on European Commission intervention in national court proceedings. Chapter 4 set out a detailed presentation of how Article 15 Regulation 1/2003 operates, tracking all cases in which the Commission has provided an opinion or intervened in national judicial proceedings. This shows the shape of the Commission's role in the decentralised system. In addition, with the potential for private enforcement in national courts increased, it is important to investigate what actually happens in the Member States. More broadly, it contributes to knowledge on how EU law is applied in Member State courts.

Chapter 2 laid the basis for the case studies by exploring concepts in the interactions between institutions. It explored the EU principle of institutional balance at the supranational level between the CJEU and the European Commission. It is questionable

whether there can be a 'diagonal' institutional balance between the supranational and the national levels, which activates the judicial autonomy of Member State courts. However, there is a duty of loyal cooperation between the EU institutions and authorities and courts at the sub-state level. The chapter then went on to consider different types of coherence, at the global, system, and single case level; the judicial functions of upholding coherence and the claims of different types of authority. It concluded with an assessment of interpretative pluralism in a system of concurrent competences.

Chapter 3 considered the diagonal relationship between national competition authorities and the Court of Justice through their (lack of) access to the Court's preliminary reference procedure under Art 267 TFEU. The preliminary reference procedure is important as the primary means for encouraging coherence of EU law through the CJEU's interpretation. It first set the context by surveying the post-2004 landscape of EU competition law enforcement, in particular multiple enforcers and the challenge of consistent application of antitrust rules in decentralised enforcement; and the quasi-judicial nature of competition enforcement undertaken by these multiple enforcers. It went on to consider the Member States' designation of institutional structures for public enforcement of competition law under Article 35 Regulation 1/2003 and assessed the significance of these designations for obligations under Reg 1/2003. Then the discussion turned from the designation of courts or administrative agencies as competition authorities at the national level, to the criteria in the EU's autonomous definition of a 'court or tribunal' for the purposes of the preliminary reference procedure. It considered how the CJEU including its Advocates General have defined and developed the concept through specific, albeit occasionally flexible, criteria. These criteria are important for determining which national bodies have access to the CJEU's advice and interpretation of the law. Of particular relevance are the need for the referring body to have an inter partes procedure i.e. to be a third party adjudicator between the parties, to be independent, and to have compulsory jurisdiction leading to a decision of a judicial nature.

The chapter focused on the *Syfait* case in which the Greek Competition Commission, as a competition authority with integrated investigative and adjudicative functions, addressed a reference to the CJEU but was ultimately refused. The chapter analysed whether the judgment bars all NCAs from access to the CJEU. The analysis focused on the CJEU's interpretation of the independence criterion and the Court's reasoning that the Commission may always potentially relieve an NCA of its competence under Article 11(6) Regulation 1/2003, implying that proceedings initiated before the NCA will not necessarily culminate in a 'decision of a judicial nature'. In practice this latter criterion could bar

references from all NCAs, regardless of their design, since they are all subject to Art 11(6) within the European Competition Network. The chapter argued that the CJEU's judgment was flawed as the effects of Art 11(6) apply only to the prosecuting authority, according to Art 35(4) Regulation 1/2003. In addition, the Commission had not in practice activated Art 11(6). However, even if the legal argument can be made for the Court to accept preliminary references from NCAs, it is argued that the message sent in *Syfait* has effectively frozen them and the Court has curtailed its own jurisdiction.

There is certainly a bias towards dualist NCAs i.e. those which separate their investigative and decision-making functions. Integrated monist NCAs, the most prevalent NCA model in the EU, have an extra hurdle to overcome because they do not have the structural separation of functions required to meet the independence requirement. As a result they do not have the same opportunity to seek guidance from the CJEU. A consequence of this is uneven access to the judicial tool of the preliminary reference procedure, dependent on institutional structure.

Chapter 3 found that there are asymmetric avenues to the supranational level for national courts and competition authorities. From the CJEU's perspective, it seems motivated to preserve its dialogue between courts only and to exclude quasi-judicial NCAs with integrated functions. If the CJEU adopts a narrow definition of a court or tribunal, it constrains its own jurisdiction. By emphasising in *Syfait* that NCAs are required to work in close cooperation with the Commission in the context of the European Competition Network, the CJEU effectively passes over responsibility to the Commission for how NCAs should interpret and apply competition law.

Meanwhile, the European Commission, as a supranational administrative authority with quasi-judicial functions, has extended its sphere of influence by strengthening its links with national courts. Chapter 4 investigated this other diagonal relationship. Previously, the Court of Justice's preliminary reference procedure, a 'dialogue between courts', was the only formal link between the courts of the Member States and the supranational level. Chapter 4 showed how the European Commission has added to this general (EU law) institutional link through the specific (to competition law) instrument of opinions and own-initiative interventions to national courts in competition cases, under Art 15 Reg 1/2003. This was placed within the context of the broader relationship between the European Commission and national judges in EU competition law through case law, in particular the effect of Commission decisions and other pronouncements on national courts. Informed by original research into the legislative background of Art 15 Reg

1/2003, it explained how this tool is designed in the absence of a formal judicial network to promote consistent application following decentralisation. Chapter 4 argued that this raised constitutional questions about the effect of concurrent competences on the institutional balance at the supranational level between the Commission and the Court of Justice, and diagonally in terms of the effect on national judicial autonomy.

The discussion took both a theoretical and a practical approach. Through the soft law literature, the theoretical element examined the legal nature of the Commission opinion as an EU instrument. It argued that the Commission's opinion in this context is a unique instrument and as such its legal effects are uncertain. It does not fit easily into the category of soft law instruments establishing 'rules of conduct.' However, it could become binding through the national court's judgment. Having explored the theoretical context, the chapter contributed original research on how Art 15 works in practice. It sought to trace all of the opinions and own-initiative interventions to date. The chapter reported 23 opinions under Art 15(1) and 9 interventions under Art 15(3), with varying degrees of success in identifying the parties and how the opinion was dealt with by the national court. The chapter found a *de facto* third category between Art 15(1) and 15(3): cases in which the Commission was 'invited' to intervene but no specific questions were put to it. In relation to Art 15(3), the chapter discussed the Commission's reason for intervention, where it could be observed, whether the national judge followed the Commission.

The preliminary ruling in X BV was analysed in detail, as it related to the admissibility of Art 15(3) interventions. The CJEU's response gave the Commission wide scope to intervene in a national court case related to the effective application of Articles 101 and 102 TFEU, even if the court is not directly applying them. Chapter 4 found that the case suggests an emphasis on *effective* – not only coherent - application of the EU rules, and that it implies that a Commission intervention could extend to national cases concerning, for example, contract disputes, follow-on damages actions, or criminal proceedings - not initially intended by Regulation 1/2003.

Some interventions are available on the Commission's website, but they are not formally published, for example in the Official Journal. The Commission has made available most of its own-initiative observations. These are the cases in which it has felt compelled to intervene, and so represent competition issues which it finds to be most important for coherent application. As such it is in the Commission's interest to publish them. By contrast, only around a quarter of the opinions requested by national courts under 15(1) have been publicised. This lack of transparency raises questions about the 'back door'

influence of these opinions in the judicial proceedings. Moreover, it does not help legal certainty and consistent application throughout the EU. The chapter therefore called for transparency through the publication of observations, ideally in different language versions. This would also promote awareness among judges of cases in other Member States.

Time will tell how judges respond to this mechanism relative both to the preliminary reference procedure (one parallel reference from a Spanish court was found), and to the possibility of calling on the national competition authority which operates within the framework of the ECN. That is likely to depend on individual judges and judicial preferences in different Member States. Art 15(3) Reg 1/2003 also allows national competition authorities to intervene in national judicial proceedings in their *own* Member State. Together with the proposal discussed in chapter 5, that could bring national courts indirectly into the European Competition Network. That could have positive benefits for the consistent application of the EU competition rules, but also brings judicial autonomy into question.

Chapter 5 discussed the proposal in the forthcoming EU directive on damages actions to introduce the binding effect of national competition authorities' decision on national courts throughout the EU. The chapter was informed by original research on the legislative process behind Reg 1/2003, in respect of the effect of Commission decisions on national courts, and on horizontal relations between national competition authorities within the European Competition Network; and researching the consultative process behind the proposed binding effect rule through responses to the White Paper on damages actions. The chapter explained the context of the rule - to incentivise claimants to bring private enforcement cases in civil courts by alleviating their burden to prove an infringement. It then went on to highlight much broader constitutional significance in terms of the interaction between judicial and administrative institutions and their decisions. It argued that the proposed rule creates an apparent hierarchy of administrative decisions over court judgments, narrowing the field of civil courts' jurisdiction. It also implies a certain burden on judges: that civil courts must be aware of all NCA infringement decisions throughout EU - and show that they are taken into account in their reasoning.

This chapter demonstrated the asymmetric effects deriving from the status of civil courts and national competition authorities. NCA decisions would be binding on national courts, but there would be no similar horizontal binding effect on fellow NCAs within the European Competition Network. The assumption is that a hard rule binding NCA with each

other's decisions is not needed given the cooperation rules within the ECN, but there is no guarantee that the ECN will continue to operate according to these rules. There are also possible uneven effects concerning Member States courts being bound by decisions of a foreign NCA but not by those of the domestic NCA.

The chapter considered the basis for this rule. Explicitly, it is an extension of *Masterfoods*, which obliges EU Member State courts not to make a ruling running counter to one made or contemplated by the European Commission. As such the chapter revisited the different understandings of *Masterfoods*. Commission decisions derive their effect by virtue of supremacy of EU law, but extension to binding effect of foreign administrative decisions in EU law less clear. The binding effect rule could be understood as a delegation, or devolution, of the Commission's enforcement powers. The chapter argued that if national courts are also EU courts, and in the system of concurrent competences, national judges' interpretation of EU law is as valid as the Commission's, and by extension an NCA's.

The chapter also examined the horizontal duty of loyal cooperation between sub-state bodies, and the analogy with the Brussels I Regulation on jurisdiction and recognition of judgments between Member States. It argued that the binding effect rule should have at least the same safeguards as Art 34(1) Brussels Reg, which would allow a civil court to refuse to recognise an authority's decisions in exceptional circumstances. If this were not the case, decisions of administrative bodies would be afforded a privileged position relative to judgments of civil courts – another example of asymmetric effects. However, questioning other Member States' compatibility with fair legal process standards may undermine trust currently fostered in the ECN.

The chapter concluded with an assessment of the possibility of the rule being adopted, including issues surrounding legal base of the directive and views in the Member States. Currently the only Member State to impose the binding effect of foreign NCA decisions is Germany. In a number of Member States there would need to be constitutional reform for the rule to be adopted. The chapter suggested that one way around this may be a semantic one – packaging the finding of infringement as an 'irrebuttable presumption' as at least symbolic gesture to independence of the judiciary. In particular, the word 'binding' should be avoided, drawing upon some Member State courts' interpretations of *Masterfoods*. As also shown in chapter 4, there are trade-offs between judicial autonomy and effective enforcement of EU competition law, and effective enforcement appears to take priority. This EU proposal will affect institutional interactions between administrative authorities

and courts at the national level, with potential impact beyond competition law enforcement.

While apparently empowering (national) courts, the post-2004 regime still limits the ambit of judicial competence in favour of administrative bodies. In some cases, it is the Court of Justice deferring to the authority of the Commission which limits the CJEU's own jurisdiction and the autonomy of national courts. The CJEU has effectively ruled out preliminary references from national competition authorities on the basis of their relationship with the Commission in the European Competition Network, thus limiting its own jurisdiction. The Commission has its own soft 'preliminary ruling procedure' with national courts, parallel to the role of the CJEU, and is also able to intervene with legal opinions at its own initiative in national judicial proceedings. The Court of Justice has confirmed the Commission's wide jurisdiction to intervene in cases in some way related to the competition rules, not necessarily only applying Article 101 or 102 TFEU. In an extension of national courts' obligation not to rule counter to a European Commission decision, they are now to be bound by national competition authority decisions.

A plurality of interpretations – and interpreters – of the law suggests a looser concept of unity or coherence. However, the interpretation of national judges is supervised. As the case studies show, in the decentralised system 'coherent' application of the rules appears to mean 'effective' application. While coherence is a central aspect of the rule of law as overseen by judges, effectiveness can be supervised by administrative authorities. Traditional judicial independence considerations are also trumped by the need for effectiveness and efficiency.

All these developments suggest that there should be more emphasis on horizontal relationships between courts, led by judges themselves.¹ This would not only lend itself to coherent – and effective – application of competition law, but would also allow courts to push back against the apparent dominance of administrative authorities in this area.

One way of doing this would be through databases of judgments as a basis of mutual guidance to allow courts to network themselves. There is already some movement in this

¹ In a broader context, Carol Harlow has suggested that national courts should network themselves to come to their own idea of justice, but, interestingly, versus the CJEU. Paper presentation, 'Cause Groups and Legal Accountability in EU Governance', UACES Annual Conference, Bruges, Sep 2010. She also draws attention to judicial networks in other areas - C Harlow & R Rawlings 'Promoting Accountability in Multi-Level Governance: A Network Approach' (2006) European Governance Papers (EUROGOV) No. C-06-02, 11

direction.² They should not only be available to specialist competition law judges, however. The diversity of languages and legal concepts³ need not be a barrier as secondary support could be drawn from existing databases on terminology could be used, for example the IATE database.⁴ Resources for continuing translation of judgments remain an issue, however.

Directions for further research

More work needs to be done on judicial preferences and responsiveness to the Commission's – and NCA's - involvement in national court proceedings. The cases uncovered under Art 15(1) in this thesis give an indication of the Member States which are most amenable to this kind of interaction. From the other side, it is not currently clear how the Commission decides whether to intervene under Art 15(3), and the areas of priority. As noted in the Report on the Functioning of Regulation 1/2003,⁵ there may actually be a demand for the Commission to intervene in more, rather than fewer cases. There is a limit to what can be observed through the record of the judgment of the national court. This would lend itself to interviews with court staff, judges, others involved in cases, and the interveners. Ideally this would need a team of national rapporteurs. This research on judicial preferences could be compared with national courts' practice on preliminary rulings.⁶

² e.g. Through the Association of European Competition Law Judges (AECLJ): “a more long term objective of the AECLJ, (as and when funding becomes available) is the creation of a database of judgments in the competition law field from each of the Member States to provide a readily accessible body of relevant materials for Members.” <http://www.aeclj.com/3587/The-work-of-the-Association.html> (last accessed 19.9.2012) ; Oxford University Press online national competition law case-reporting service; European Commission funded projects at

http://ec.europa.eu/competition/court/call_2010_results_en.pdf (accessed 23.10.2011) including ‘Colloquium on European competition law for judges: Implementation,

Decentralisation, Cooperation, Consistency (I.D.C.C.) and setting-up of an internet site on European Competition Law (E.A.S.E. – European Antitrust-Law search engine by Sept 2013’

³ K Lenaerts and D Gerard ‘Decentralisation of EC Competition Law: Judges in the Frontline’ (2004) 27(3) *World Competition* 313-349, 336

⁴ InterActive Terminology for Europe – The EU’s multilingual term base <http://iate.europa.eu/iatediff/SearchByQueryLoad.do?method=load> (last accessed 19.9.2012)

⁵ Communication from the Commission to the European Parliament and the Council: Report on the functioning of Regulation 1/2003, COM (2009) 206 final

⁶ In competition law, see B Rodger (ed) *Article 234 and Competition Law: An Analysis* (Kluwer, 2008), relating to pre-2004 cases. Stone Sweet suggests that under-researched questions are “to what extent does the law and politics of litigating European law vary across jurisdictional and national boundaries? Are some jurisdictions more receptive than others to enforcing E[U] law?” A-M Slaughter, A Stone Sweet & J Weiler (eds), *The European Courts and National Courts: Doctrine and Jurisprudence* (Hart, 1997) 330.

In EU law enforcement more broadly, the diagonal relationship between the European Commission and national courts does not seem to have been researched. Is it possible to generalise about the role of the European Commission, given its historical particular dominance in competition enforcement? What about other EU policy areas?

In a still wider literature on judicial politics, this could relate to research into the impact of *amicus curiae* interventions, and administrative agencies' interpretations of the law more broadly, on judicial decision-making.

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APPENDIX: PUBLISHED WORK

Some material in Chapter 4 was published as:

K Wright 'The European Commission's Own 'Preliminary Reference Procedure' in Competition Cases?' (2010) 16(6) *European Law Journal* 736-759

An earlier version of the ideas, and the case tables, in Chapter 4 appeared in:

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Some ideas in Chapter 5 also appeared in:

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Reference is made in this thesis to interview research on the 2004 EU competition law reforms and on the European Competition Network which also resulted in a co-authored publication,

H Kassim & K Wright 'Bringing Regulatory Processes Back In: The Reform of EU Antitrust and Merger Control' (2009) 32(4) *West European Politics* 738-755