

British Institute of International and Comparative Law

Expert competition law workshop for national judges

Maintaining consistency of application by national courts and NCAs/EC Commission

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Introduction

- The competence of national courts to apply EC Competition Rules
 - Regulation 1/2003: Articles 1, 6; Articles 5, 11 and 35
 - Commission Notice: Part II, paras 3 to 14
- Cooperation and consistency in application of EC Competition Law by Commission and national courts
 - Regulation 1/2003: Article 15 (Cooperation with national courts); Article 16 (Uniform application of community Competition law)
 - Commission Notice: Part III, A – Commission as Amicus Curiae (paras 17 to 35); B – National courts facilitating the role of the Commission in enforcement of EC Competition Law (paras 36 to 41)

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Introduction (2)

- Cooperation under Article 15 in practice since 1 May 2004
 - Requests from national courts for information or opinions of the Commission (Article 15(1))
 - Communication of national judgments to the Commission (Article 15(2))
 - Submission of observations to national courts (Article 15(3))

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National court competence: Regulation 1/2003

- Article 1: Direct applicability of Article 81 and 81(3) and 82 subject to Article 16 and risk of conflicting decisions
- Article 6: The national court's power to apply Articles 81 and 82 EC where they have jurisdiction under Council regulation 44/2001
- Article 5 (NCA powers), Article 11 (cooperation between Commission and NCAs), Article 35 (National Competition Authority designation may include courts)
- Increased power of NCAs to apply Article 81(1) and 81(3) and 82 likely to create more work for national courts either as review courts or as the designated national competition authority (eg Competition Court of Stockholm)

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National court competence: Regulation 1/2003 (2)

- National court may apply Articles 81 or 82 EC as civil courts, review courts, or criminal courts; or as a public enforcement authority (NCA) under Article 35(1) (when cooperation will be governed by the notice on cooperation on NCAs)
- National courts must apply EC competition rules as well as national competition law where conduct affects trade between Member States (Article 3(1))

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National court competence: Regulation 1/2003 (3)

- No express convergence obligation for Article 82 and unilateral conduct under Article 3, but the general principle of the primacy of Community Law obliges national courts to disapply any national law rule which conflicts with Community law regardless of whether the national law pre or post-dates the community rule: case 106/77, *Simmmenthal* [1978] ECR629, 21; Case C198/01, *Consorzio Industrie Fiammiferi (CIF)* [2002] ECR 49

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National court competence: Regulation 1/2003 (4)

- Parallel application of national competition law to conduct which affects trade between Member States may not lead to a different outcome from that of EC Competition Law: Conduct which does not infringe Article 81(1) or fulfils the exemption conditions of Article 81(3) EC may not be prohibited under national Competition Law (Article 3(2)); conduct which violates Article 81(1) and does not satisfy Article 81(3) EC, may not be authorised by national law (case 14/68, *Walt Wilhelm* [1969] ECR1)

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National court competence: Regulation 1/2003 (5)

- National courts must apply Community law measures of direct effect, eg individual decisions (under Articles 7 to 10, 23 and 24), block exemption regulations and within this framework of Community Law are bound to observe the general principles of Community Law; bound by the caselaw of the Community courts; bound by the Commission application of Article 81 or 82 EC in a specific case, when they apply the competition rules in the same case in parallel with or subsequent to the Commission (para 8 and paras 11 to 14, Commission Notice); guidance may be obtained from Commission regulations and decisions applied by analogy as well as notices and guidelines and annual reports and competition policy

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National court competence: Commission Notice

- One of the six notices published by the Commission in April 2004 concerns cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC
- The notice does not bind the national courts nor affect the rights and obligations of Member States or persons under Community Law (para 42)
- It replaces the 1993 notice on cooperation between the national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty
- Part II covers the powers of the national courts to apply EC Competition Law, the procedural aspects of the application of those rules, and the parallel or consecutive application of EC Competition Law by the Commission and national courts (paras 3 to 14)

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National court competence: Commission Notice (2)

- Procedure and remedies for enforcement of EC Competition Law by national courts are a matter for national law in the absence of Community law provisions on procedures and sanctions, subject to compliance with the general principles of Community law:
 - Principle of effectiveness: must not make enforcement excessively difficult or practically impossible (Case 33/76, *Rewe* [1976] ECR 1989, 5
 - Principle of equivalence: must not be more favourable than the rules applicable to the enforcement of equivalent national law: *Rewe* Case 199/82, *San Giorgio* [1983] ECR 3595

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National court competence: Commission Notice (3)

- When the infringement of community law causes harm to an individual, it must be possible to claim damages: Case 453/99 *Courage v Crehan* [2001] ECR 6297, 26 and 27; case C-178/94 et al *Dillenkofer* [1996] ECR-I-4845, 22 to 26, 72
- Where Community law is infringed, national law must provide for a remedy which is effective, proportionate and dissuasive; case 68/88, *Commission v Greece* [1989] ECR 2965, 23 to 25

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National court competence: Commission Notice (4)

- Community law may expressly impinge on national procedure and remedies:
 - to permit national courts to ask for the Commission's opinion on questions concerning the application of EC Competition Law (paras 27 to 30)
 - to oblige national courts to allow the Commission and NCAs to submit written observations (paras 31 to 35), and conflicting national rules must be set aside

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Parallel or consecutive application of EC competition law by the Commission and national courts: Consistency

- Parallel application of Articles 81 and 82 EC by the Commission and the national court is prevented where the national court is a designated national competition authority (Article 11(6) together with Article 35(3) and (4))
- National courts must avoid a decision that would conflict with a decision contemplated by the Commission (Articles 16(1))

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Parallel or consecutive application of EC competition law by the Commission and national courts: Consistency (2)

- A national court, therefore, may ask the Commission whether it has initiated proceedings (which the Commission makes public under Article 2(2) when it is initiating a procedure for the adoption of a decision under Articles 7 to 10); about the progress of the proceedings and the likelihood of a decision (para 21 of a notice); and the national court may stay its proceedings for reasons of legal certainty until the Commission has reached a decision

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Parallel or consecutive application of EC competition law by the Commission and national courts: Consistency (3)

- When the Commission reaches a decision in a particular case before the national court the court may not take a decision which runs counter to that of the Commission, subject to making a reference to the ECJ on the validity of the Commission Decision under Article 234 EC

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Parallel or consecutive application of EC competition law by the Commission and national courts: Consistency (4)

- If the Commission's decision is challenged directly under Article 230 EC and the outcome of the dispute before the national court depends on the validity of the Commission decision, the national court should stay its proceedings pending the final judgment unless it considers that a reference to the ECJ for a preliminary ruling on the validity of the Commission Decision is warranted (Article 16(1); case C-344/98 *Masterfoods* [2000] ECR I-11369, 52 to 59)

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Parallel or consecutive application of EC competition law by the Commission and national courts: Consistency (5)

- When a national court stays proceedings to await a Commission decision or pending final judgment by the Community courts in a direct annulment action or a reference under Article 234 EC, the court must determine whether or not to adopt interim measures or interim relief to safeguard the interests of the parties: *Masterfoods*, 58

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Cooperation and consistency: Regulation 1/2003

- Article 15: Cooperation with national courts – Commission role as "amicus curiae" in the national courts:
 - Possibility for courts to ask Commission for information in its possession or its opinion (Article 15(1) – no change to present position)
 - Copies of written judgments of national courts must be forwarded to the Commission "without delay" (Article 15(2) – new obligation)
 - Own initiative submissions of written observations by the Commission to the national court as well as oral observations with the permission of the national court (Article 15(3) – new obligation)

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Cooperation and consistency: Regulation 1/2003 (2)

- Article 15(3) expressly permits the Commission to intervene in national proceedings but only in cases where coherent application of Article 81 or 82 so requires; the Commission may request the national courts to transmit documents necessary for the assessment of the case to enable the Commission to decide whether to participate in an appeal from a judgment notified to the Commission by a First Instance Court

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Cooperation and consistency: Regulation 1/2003 (2)

- Article 16: Uniform application of Community competition law:
 - National courts may not take decisions inconsistent to decisions adopted by the Commission
 - National courts must avoid giving decisions which conflict with the decision contemplated by the Commission and may assess whether it is necessary to stay proceedings for that purpose
- Article 16 is a codification of the *Delimitis* case C-234/89, *Delimitis* [1991] ECR I-935 and *Masterfoods*

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Cooperation and consistency: Regulation 1/2003

- The decisions are binding on termination of an infringement (Article 7); interim measures (Article 8); the finding of inapplicability (Article 10). However, commitment decisions adopted by the Commission under Article 9 do not affect the powers of the national courts to apply Articles 81 and 82 EC (Recital 22)
- A national court faced with a decision by the Commission or by another court on which it has doubts should make a reference to the ECJ under Article 234 EC as contemplated by Article 16 paragraph 1 last sentence

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Cooperation and consistency: Commission notice

- Part III concerns cooperation between the Commission and national courts:
 - The Commission as amicus curiae (A, paras 17 to 35)
 - The national courts facilitating the relevant Commission and enforcement of EC Competition Rules (B, paras 36 to 41)
 - The notice deals with the Commission's role of amicus curiae in three sub-divisions:
 - the Commission's duty to transmit information to national courts
 - the request for an opinion on the questions concerning the application of EC Competition Rules
 - the Commission's submission of observations to national courts

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Cooperation and consistency: Commission notice (2)

- The notice confirms that the Commission will be neutral and not comment on the merits of the particular case; in particular, it will not hear any of the parties and if it has been contacted by them it will inform the national courts (para 19)

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Cooperation and consistency: Commission notice (3)

- The Commission's duty to transmit information
 - The Notice confirms that a national court may ask the Commission for documents in its possession or for information of a procedural nature to enable it to discover whether a case is pending, whether the Commission has initiated a procedure or whether it has already taken a position, and when a decision is likely to be taken. The Commission will endeavour to provide the national court with the requested information within one month of receiving the request, unless it has to ask for further clarification or where it has to consult "those who are directly affected by the transmission of the information".

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Cooperation and consistency: Commission notice (4)

- However, the Commission has to uphold the guarantees given by Article 287 EC, which prevents it from disclosing information covered by the obligation of "professional secrecy". This may be both "confidential information" and "business secrets". Case-law confirms that the duty of loyal cooperation (Article 10 EC) requires the Commission to provide the national court with whatever information it asks for, including information covered by professional secrecy. However before giving such information it will ask the court whether it can and will guarantee protection of confidential information and business secrets. If the national court cannot offer such a guarantee the Commission will not transmit the information (paras 21 to 26).

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Cooperation and consistency: Commission notice (5)

- The Commission may refuse to transmit information for overriding reasons relating to the need to safeguard the interests of the Community or to avoid any interference with its functioning and independence. Therefore, the Commission will not transmit to national courts information voluntarily submitted by a leniency applicant without the consent of the applicant.

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Request for an opinion

- A national court may ask the Commission for its opinion on questions concerning the application of EC competition rules – on economic, factual, or legal matters. The Commission will endeavour to reply within four months of receiving the request, unless it has to ask the court for further information. The Commission will limit itself to providing the national court with an opinion, without considering the merits of the case pending before the court, and will not "hear" the parties before formulating its opinion. Article 234 EC also permits (or even obliges, in certain cases) the national court to ask the Court of Justice for a preliminary ruling regarding the interpretation or validity of Community law - in any event, the opinion of the Commission does not legally bind the national court (paras 27 to 30).

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The Commission's submission of observations

- The Notice refers to the provisions of articles 15(3) of Regulation 1/2003 on the submission of observations by the national competition authorities and the Commission to a national court which is called upon to apply the provisions of articles 81 and 82 EC. It states that the Commission "will limit its observations to an economic and legal analysis of the facts underlying the case pending before the national court". Any documents transmitted by the national

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The Commission's submission of observations (contd ..)(2)

court will only be used by the Commission for the preparation of its observations. It is for the Member States to determine the relevant procedural framework for the submission of observations subject to certain general principles of Community law summarised in paragraph 10 of the Notice. Where a procedural framework has not been established it is for the national judge to determine the appropriate procedural rules (paras 31 to 35).

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The national courts facilitating the roles of the Commission

- Apart from the role of national courts in the context of Commission inspections, the Notice is limited to the obligations on the Member States (under Article 15(2) of Regulation 1/2003) to send to the Commission a copy of any written judgment of a national court applying Articles 81 and 82 EC "without delay". This, according to the Notice, will "primarily enable the Commission to become aware in a timely fashion of cases for which it might be appropriate to submit observations where one of the parties lodges an appeal against the judgment (paras 36 and 37).

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Implementation of Article 15

- There have been about ten requests from national courts for information or opinions of the Commission under article 15(1)
- There have been about 22 national judgments communicated to the Commission under article 15(2) but the Commission believes that there are more judgments.
- The Commission has not yet submitted any observations to a national court under article 15(3).