

# European Commission Opinions to National Courts in Antitrust Cases: Consistent Application and the Judicial-Administrative Relationship

April 2009

 Consistent  
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## BACKGROUND

- Decentralisation of Article 81 and Article 82 EC enforcement under Regulation 1/2003 (the 'Modernisation Regulation') has led to an increase in the powers and jurisdiction of national competition authorities and national courts.
- In a decentralised system, there are potentially greater risks of divergence. While national competition authorities are closely linked through the cooperation mechanisms of the European Competition Network, with its rules for case allocation and consistent application of Community competition law, no such mechanism exists for national courts, respecting the principles of judicial independence and procedural autonomy.
- The Commission, as primary enforcer of competition law in the Community, has therefore attempted to complement the formal judicial dialogue of the European Court of Justice's preliminary reference procedure with a strengthening of its own relations with the national courts.

## METHODOLOGY

- This paper first sets the context of the broader relationship between the European Commission and national judges.
- The paper then examines the legal nature and use of one tool to promote consistent application of EC antitrust rules: formally non-binding European Commission opinions and amicus curiae briefs to national courts in antitrust proceedings under Article 15 of the Modernisation Regulation.
- National cases are identified where the Commission's opinion has been sought or where it has intervened under Article 15. The paper attempts to assess the nature, impact and efficacy of this soft law mechanism.

## KEY FINDINGS

- Examining information on the opinions delivered so far at the request of national courts (Article 15(1)), the Commission appears not to be taking a heavy-handed approach, but in most cases is summarising existing ECJ case law, its own guidelines and decisional practice.
- Where the Commission considers that the consistent application of EC antitrust rules is under threat, it has shown itself willing to intervene as amicus curiae (Article 15(3)) - in two cases so far.

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# CCP Policy Briefing

- ‘Non-binding’ opinions may become binding through a national court judgment, especially if national judges simply transpose the Commission’s advice.
- There may be implications for the parties’ procedural rights and evidence issues.
- Without publication of the opinions themselves, it is difficult to examine their application in the national proceedings and to assess what impact they have on coherent application of the EC competition rules post-reform.

## POLICY ISSUES

- Commission intervention may be desirable as a means of achieving consistent application of the rules; but it should be done in an open and transparent way rather than appearing to influence judicial decisions ‘by the back door’.
- Publication of the European Commission’s opinions is desirable for legitimacy and legal certainty, and if Commission opinions are to have the most impact for promoting convergent application of EC antitrust rules among national judges.

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## THE CCP

The ESRC Centre for Competition Policy (CCP), at the University of East Anglia, undertakes competition policy research, incorporating economic, legal, management and political science perspectives, that has real-world policy relevance without compromising academic rigour.

## FOR MORE INFORMATION

The full working paper (CCP Working Paper 08-24) and more information about CCP and its research is available from our website: [www.ccp.uea.ac.uk](http://www.ccp.uea.ac.uk)

## ABOUT THE AUTHOR

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