



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

by

Kathryn Wright

ESRC Centre for Competition Policy, University of East Anglia

CCP Working Paper 08-24

Abstract: The House of Lords judgment in *Inntrepreneur v Crehan*, where the court did not consider itself bound by a finding of the European Commission, demonstrated the potentially contentious and constitutionally significant nature of the relationship between the European Commission and national judges in the field of antitrust.

The decentralisation of enforcement of Articles 81 and 82EC arguably carries greater risks of divergent application of EC antitrust enforcement rules. While national competition authorities are linked through the European Competition Network, no such mechanism exists for national courts as this would offend against 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.

After addressing the broader theoretical context of administrative intervention in judicial decision-making, this paper examines the use of one tool to promote consistent application of EC antitrust rules - non-binding European Commission opinions and amicus curiae briefs to national courts in antitrust proceedings under Article 15 of the Modernisation Regulation. It identifies national cases where the

Commission has actually intervened under Article 15 and assesses the nature and efficacy of this soft law mechanism. One finding is the difficulty in finding and tracing the cases, making the impact of the Commission's advice difficult to judge. Transparency is desirable for legitimacy, legal certainty, and if Commission opinions are to have the most impact for promoting convergent application of EC antitrust rules among national judges.

July 2008

JEL Classification Codes: K12, K49, P48

Keywords: European Commission, national courts, amicus curiae, Modernisation Regulation, public and private competition enforcement

Acknowledgements:

With thanks to Michael Harker for helpful discussion and comments on an earlier draft, and to the participants in the ESRC Centre for Competition Policy Third Annual PhD Workshop on 13 June 2007 and the Norwich Law School research seminar on 6 December 2006 to whom I presented early ideas. The support of the Economic and Social Research Council is also gratefully acknowledged.

Contact details:

Kathryn Wright, Research Associate and PhD Candidate, Centre for Competition Policy, University of East Anglia, Norwich, Nr4 7TJ, UK

Kathryn.wright@uea.ac.uk

Introduction

Decentralisation of Article 81 and 82 EC enforcement under Regulation 1/2003 (the 'Modernisation Regulation')¹ has led to an increase in the powers and jurisdiction of national competition authorities (NCAs) and national courts. While NCAs are closely linked through the cooperation mechanisms of the European Competition Network (ECN), with its rules for case allocation and consistent application of Community competition law², no such mechanism exists for national courts, respecting the principles of judicial independence and procedural autonomy. In a decentralised system, there are greater risks of divergence: different application of EU law between national jurisdictions; inconsistency between EU and national law; and different application by different types of enforcers: NCAs and national courts, public and private enforcers. The House of Lords judgment in *Inntrepreneur v Crehan*³, where the court did not consider itself bound by a finding of the European Commission, demonstrated the potentially contentious and constitutionally significant nature of the relationship between the European Commission and national judges in the field of antitrust.

This situation raises broader questions about administrative intervention in judicial proceedings and the role of soft law in the quasi-judicial system of competition regulation and enforcement. By 'quasi-judicial' I mean that investigative, decision-making and enforcement functions may be carried out by a single agency⁴, that there are different types of administrative and judicial bodies making and enforcing the law, and that there are different degrees of persuasive or binding force attached to the rules they apply. One objective of decentralisation, and subsequently of the recent European Commission White Paper on damages actions⁵, is to increase private enforcement of competition law before national courts. The judicial-administrative relationship at the institutional nexus of public and private

¹ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules of competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p.1-25)

² Commission Notice of 27 April 2004 on cooperation within the Network of Competition Authorities, (OJ C 101, 27.04.2004, p. 43-53)

³ *Inntrepreneur v Crehan* [2006] UKHL 38, judgment of the House of Lords of 19 July 2006, overturning the Court of Appeal judgment [2004] EWCA Civ 637

⁴ See Wils, W (2004) 'The combination of the investigative and prosecutorial function and the adjudicative function in EC antitrust enforcement: a legal and economic analysis' 27(2) *World Competition* 201-224

⁵ White Paper on damages actions for breach of the EC antitrust rules, COM(2008) 165, 2.4.2008

enforcement is important for the overall success of the competition enforcement regime.

This paper first sets the context of the broader relationship between the European Commission and national judges, before describing the relevant provisions of the Modernisation Regulation and its accompanying Courts Notice⁶, which incorporate various tools to minimise the risk of divergence and promote consistent application of EC antitrust rules. The paper specifically focuses on Article 15, which provides for the European Commission's intervention in national court proceedings. Under Article 15, EU Member State courts may ask the European Commission 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)). It identifies national cases where the Commission's opinion has been sought or where it has intervened under Article 15 and attempts to assess the nature, impact and efficacy of this soft law mechanism.

Consistent application of EC antitrust rules in national courts and the status of Commission views

The Modernisation Regulation decentralises the enforcement of EC antitrust rules as laid down in Articles 81 and 82 of the Treaty. National courts and competition authorities can directly apply these provisions, including the possibility to grant an exemption under Article 81(3), previously within the exclusive jurisdiction of the European Commission. The absence of a formal network for judicial cooperation⁷ emphasises the importance of the provisions in the Courts notice and of the case law of the Community courts.

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, 27.04.2004, p. 54-64)

⁷ There are fora such as the Association of European Competition Law Judges and the European Judicial Training Network, but these are not linked to the Commission. The Commission does provide funding for training judges in developments in EC competition law and assessing economic evidence.,.

According to *BRT v SABAM*⁸, Articles 81 and 82EC are directly effective, and confer rights on individuals which national courts must protect. National judges may be called upon to apply competition rules in various proceedings, and cases relating to competition rarely come neatly packaged as such. Usually a case will not be brought purely on the basis of Article 81 or 82, and at the very least pleadings would be likely to include national competition law provisions too. Member State courts may apply Article 81 or 82 in administrative, criminal or civil proceedings. To date, they have most frequently been used as a ‘shield’, primarily seeking annulment of obligations under an agreement or contract on the grounds of incompatibility with Articles 81EC. However, these articles can also be used as a ‘sword’ to seek remedies such as injunctive relief or damages. It is particularly this latter type of private enforcement that the European Commission is hoping to encourage to support its own public enforcement function and to promote a competition culture throughout the Community.⁹

From a procedural perspective, if domestic law confers on national courts a discretion to apply of their own motion binding rules of law, national courts must apply the EC competition rules, even when the party with an interest in application of those provisions has not relied on them, where domestic law allows such application by the national court. However, “Community law does not require national courts to raise of their own motion an issue concerning the breach of provisions of Community 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.”¹⁰

In the interests of consistent enforcement of EC competition law throughout the Community, where a national court applies national competition laws to practices within the meaning of Article 81 and 82 which may affect trade between Member States, it must also apply Article 81 and 82. If an agreement, decision or practice is not prohibited under Article 81, the court cannot apply stricter national rules to

⁸ 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

⁹ There is a literature on strategic use of antitrust rules by rivals which is beyond the scope of this paper. See e.g. Brodley, J F (1995) ‘Antitrust standing in private merger cases: reconciling private incentives and public enforcement goals’ 94(1) *Michigan Law Review* 1-108 (Oct 2005)

¹⁰ Courts Notice (n. 6) para 3, citing C-430/93 & C-431/93 *van Schijndel* [1995] ECR I-4705, paras 13-15, 22

prohibit it (but it may apply stricter rules than Article 82), and it may not allow a practice which is prohibited by Article 81 or 82. This convergence rule is encapsulated in Article 3 of Regulation 1/2003, meaning that national competition rules may not lead to a different outcome than that of EC competition law. It builds on the principle of parallel application as established in *Walt Wilhelm*¹¹, which confirms that where there is a conflict between national and European competition law, the latter takes precedence.

Furthermore, following the ECJ rulings in *Delimitis*¹² and *Masterfoods*¹³, Article 16 of the Modernisation Regulation states that where national courts rule on agreements, decisions or practices under Article 81 or 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to that adopted decision¹⁴. If the Commission is contemplating a decision, the national court must avoid adopting a decision that would conflict with it.¹⁵ The interpretation of the obligation in *Masterfoods* arose in the House of Lords judgment in *Inntrepreneur v Crehan*¹⁶, apparently undermining the Commission's finding of fact (foreclosure) in previous decisions involving beer ties in the same market.¹⁷ A Commission decision is binding in its entirety upon those to whom it is addressed, according to Article 249EC. The converse suggests that it is not legally binding on those to whom it is not addressed. Nevertheless, 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 81(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

¹¹ C-14/68 *Walt Wilhelm v Bundeskartellamt* [1969] ECR 1

¹² Case C-234/89 *Delimitis* [1991] ECR I-935

¹³ C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369

¹⁴ 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.

¹⁵ See Komninos, A P (2007) 'Effect of Commission decisions on private antitrust litigation: Setting the story straight' 44 CMLRev 1387 for discussion of the impact of a Commission decision on national proceedings in various scenarios.

¹⁶ n.3

¹⁷ In its *Whitbread, Bass and Scottish and Newcastle* decisions, the Commission had made a factual assessment that between 1991 and 1993 the on-the-premises beer market in England was foreclosed as a result of the cumulative effect of beer tie agreements, applying the two conditions laid down in *Delimitis* (n. 18): (i) whether the market is foreclosed, and (ii) whether the agreement complained of significantly contributed to that foreclosure

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” (*Banks*¹⁸).

According to Advocate General Cosmas in *Masterfoods*, there is no conflict where the proceedings are not “completely identical”.¹⁹ Applying this, the House of Lords interpreted 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*. 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”. ‘Grounds’ could encompass findings of fact open to reconsideration by the national judge.

Lord Hoffman in *Crehan* 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. This implies that its basis can be revisited in the national proceedings and argued between the parties. The Commission’s letter to the parties of 24 November 1997 explaining its decision to suspend its proceedings stated that the national court *could*

¹⁸ C-128/92 *H J Banks & Co Ltd v British Coal Corporation* [1994] ECR I-1209

¹⁹ Opinion of Advocate General Cosmas delivered on 16 May 2000 in Case C-344/98 *Masterfoods* (n.13), at 16

²⁰ n.3, at 69: “There was a good deal of discussion, both before the Court of Appeal and in argument before the House, about the degree of “deference” which a national court should show to a decision of the Commission. Mr Vaughan QC is recorded (in para 96 of the judgment of the Court of Appeal) as having constructed a scheme of three degrees of deference (absolute deference, very great deference and deference) which might have to be paid to a decision of the Commission. For my part, I do not find deference in this context a very helpful expression. It is commonly (if not altogether happily) used in administrative law when a court decides that the decision-making power on a particular question properly belongs to someone else and that the court should not substitute its own view. But the decision-making power on whether article 81(1) applies plainly belonged to the English court, exercising concurrent jurisdiction, and I find it difficult to see how the exercise of this power can be combined with “deference” to the decision of someone else. The correct position is that, when there is no question of a conflict of decisions in the sense which I have discussed, 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 all 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. Only a rule of law, in the nature of an issue estoppel which obliges him to do so, could produce such a result and the Court of Appeal accepted that there was no such rule.”

“take into account” its earlier conclusions in *Whitbread* and the other beer tie cases as “indirect guidance” even if they did not amount to a final decision, not that it was *obliged* to take them into account.

The English *Crehan* case demonstrates the sometimes problematic relationship between the national judge and the Commission, which 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. A national court in another jurisdiction may have decided the case differently, which could defeat the objective of consistent application in the EC antitrust regime.

Despite the *Masterfoods* rule, there is no hierarchical relationship between the national judge and the European Commission as an institution. First, national courts are also Community courts (Slaughter²¹). Secondly, there is a separation of powers argument that a court cannot be bound by an administrative body - although Paulis contends that this doctrine only applies within the same legal order and therefore cannot be applied between the Community and national levels²². As Komninos argues²³: “...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...”

In the Treaty, the only direct institutional link between the national courts and the European institutions to enforce consistent application of EU law is their relationship with the European Court of Justice through the preliminary reference procedure

²¹ Slaughter, A-M, Stone Sweet, A, Weiler, J H H (eds) The European Courts and National Courts: Doctrine and Jurisprudence. Oxford, Hart Publishing

²² Paulis, E (2000) ‘Coherent application of EC competition rules in a system of parallel competencies’ European University Institute Robert Schuman Centre for Advanced Studies 2000 EU Competition Workshop Proceedings, pp.22-3, subsequently in Ehlermann, CD and Atansiu (eds) *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy*, Oxford, Hart Publishing

²³ Komninos A P (2006) ‘Public and Private Antitrust Enforcement in Europe: Complement? Overlap?’ 3(1) *Competition Law Review* 5-26 at 16

under Article 234 EC, where a court asks the ECJ for a ruling on the interpretation of the Treaty or other legislative acts. The Commission, as primary enforcer of competition law in the Community, 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.²⁴ To that end, the Modernisation Regulation contains a number of instruments of co-operation between the Commission and the courts, including those under Article 15. These instruments are based on the principle of loyal co-operation between the European institutions and the Member States in achieving the objectives of the Treaty, deriving from Article 10 EC²⁵ 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*²⁶]."

Legal nature of the Commission opinion as a Community instrument

There is wide discretion for the Commission to deliver opinions and recommendations under Art 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*". Article 249 EC 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 ECJ's judgment in *Grimaldi* appears to go further, at least in its treatment of recommendations: "Recommendations are not intended to produce binding effects, and therefore they cannot create rights upon

²⁴ Recital 21 Modernisation Regulation 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 81 and 82 of the Treaty, whether applying these rules in lawsuits between private parties, acting as public enforcers or as review courts..."

²⁵ "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."

²⁶ Case C-94/00 *Roquette Frères* [2002] ECR 9011, at 31

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.”²⁷ The ECJ therefore recognises that while an instrument may not have binding force, it may still have legal significance.

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 249EC. However, they have been distinguished based on their origin, addressee, and content. Opinions are usually adopted on someone else’s initiative [as in Article 15(1)], whereas recommendations are made on the institutions’ own initiative²⁸. 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”²⁹. Unlike a recommendation, an opinion does not function as an alternative to legislation. Opinions are normative and individual, concerning already adopted behaviour, or prescribing certain behaviour to a certain addressee.

Opinions to courts are particular because they represent the “Commission’s point of view given with respect to a certain way of acting in a particular case”. Senden contends that individual soft law acts may be capable of having ‘incidental’ binding force, by virtue of another decision or instrument³⁰. As we have seen, the Courts notice (para 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 potential soft binding force is not necessarily dependent on one of these instruments, and the scope of the Commission’s advice can reach beyond them. For example, the advice may become

²⁷ C-322/88 *Grimaldi v Fonds des Maladies Professionnelles* [1989] ECR 4407, at 19

²⁸ Beutler, B & Bieber, R (1993) *Die Europäische Union: Rechtsordnung und Politik*, Nomos, Baden-Baden, pp. 192-3 & 199, cited in Senden L (2004) *Soft Law in European Community Law*, Hart Publishing, Oxford and Portland, p. 161

²⁹ Smit, H & Herzog, P (2002) *The Law of the European Community: A Commentary on the EEC Treaty*, vol 5, Matthew Bender & co, p. 629, cited in Senden (n.28), pp. 161-2

³⁰ Senden (n.28), p. 236

binding through the national judgment by virtue of the way in which the national judge uses it for interpretation of other obligations or instruments.

Senden posits that incidental legally binding force can be based on *substance* or *agreement*. Conditions for incidental legally binding force on basis of substance are the intention of the adopting institution [in this case, the national court]; whether new or implied legal effects are at issue; legal basis of the act and the exercise of competence. On the basis of agreement, incidental binding force would come about where explicitly provided for in Community law, or where Community law has established a specific *duty of cooperation* between institutions and member states. The latter is relevant for our purposes given Art 10EC and general principles of Community law (implicitly legal certainty), and principles of effectiveness and equivalence, invoked in para 35 of the Courts notice.³¹

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, most usually to Member States before infringement proceedings under Article 226EC; and for internal purposes in the legislative decision-making process, especially under the co-decision procedure.³²

To the author's knowledge, none of the opinions to national courts discussed below have been published in the Official Journal, as Community instruments are required to be under the Rules of the Procedure of the Commission³³. The fact that an act is published or notified may be indicative of an intention that it should have binding force. Perhaps the Commission is reluctant to publish for this reason, as it may wish to avoid appearing to 'step on the toes' of national judges. Another reason for lack of

³¹ The principle of equivalence implies that 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. The principle of effectiveness means that national procedural rules should not make it virtually impossible or excessively difficult for individuals to exercise their rights under EU law. (Case 33/76 *Rewe-Zentralfinanz v Landwirtschaftskammer fuer das Saarland* [1976] ECR 1989).

³² Senden (n.28), p. 186-7; Craig & de Burca also discuss Commission opinions only in relation to comitology procedures, and to Member State infringement proceedings: Craig, P & de Burca, G (2002) *EU Law: Text, Cases and Materials*, 3rd edition, OUP, p.397 et seq

³³ Rules of Procedure of the Commission, C (2000) 3614, Doc no 2000 773 EC (OJ 2000, L 308) p.26 (8.12.2000). Articles 17 [Secretary General] and 18 [Authentication of Commission instruments]: The Secretary General must ensure that all Community instruments mentioned in Article 249EC are notified to those concerned and published in the Official Journal.

publication could be to preserve the confidentiality of the parties, but it would be desirable to at least publish a non-confidential version. Transparency is desirable for legitimacy and legal certainty and from a more practical perspective if Commission opinions are to have the most impact for promoting convergent application of EC antitrust rules among national judges.

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 strictly normative effect, 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 (*inter partes*), but a universal binding effect (*erga omnes*) could result if a principle expressed in a Commission opinion then becomes a precedent in the national case law. If the Commission were to publish its opinions, it would strengthen their universal binding effect, which is desirable if the aim is to promote consistent application of the rules across Member States.

Diverging from a Commission opinion could still have legal consequences. The case of *Koebler*³⁴ established that the principle of Member State liability for damage caused to individuals by infringements of EU law extends to judgments of the national court of last instance (but only where the court has "manifestly infringed" the applicable law). Despite the non-binding nature of an opinion, in cases where the Commission has intervened but the court has declined to follow its advice, the evidence of failure to apply EU law may be stronger.

One foreseen purpose of the *amicus curiae* mechanism in the decentralised competition regime was to alert judges to decisions in other Member State courts.³⁵ A similar effect could result through the information passed in opinions. This could

³⁴ Case C-224/01 *Gerhard Koebler v Republik Oesterreich*, judgment of 30 September 2003

³⁵ SEC (2001) 1827 Commission staff working paper: Reform of Regulation 17 – The proposal for a new implementing regulation – Article 15(3) submissions as *amicus curiae*, Brussels, 13.11.2001 (submitted to the Council working group)

create an informal network, through a flow of cooperation vertically up between the Commission and a Member State court and back down to other Member State judge. While judges would not have direct horizontal links with each other, cooperation could be strengthened through vertical links with the Commission.

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. This would be the case if the Commission intervened in judicial reviews of NCA decisions, as well as in private action cases. The Commission and NCAs are to inform each other through the ECN if they intervene with an amicus brief in any case – indirectly linking national courts with the ECN. The proposal to allow the binding effect of NCA 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.³⁶

Article 15 Modernisation Regulation as a tool for consistent application

Under the Modernisation Regulation, the Commission may become involved in a national court case in three ways: by transmitting information; by giving an opinion (both under Article 15(1)); or by submitting written or oral observations as *amicus curiae* (15(3)).

Article 15(1) of the Modernisation Regulation provides that “In proceedings for the application of Article 81 or Article 82 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 Courts Notice elaborate on the principles and procedure to

³⁶ The binding effect of an NCA's decision may dilute the Commission's leadership and influence, but NCA decisions would be notified first through the ECN, so the trade-off would be a greater contribution to consistent application. See, *contra*, Komninos (n. 15), p. 26, who opposes the proposal on the grounds that it would create a false hierarchy of public over private enforcement. This is a topic for another paper. NCAs are bound only by *existing* decisions of the Commission, not envisaged ones (article 16(2)) – could this be evidence of a public over private enforcement hierarchy, or does it merely reflect the reality of structured cooperation within the ECN?

be followed³⁷ - see appendix for the full text of Article 15 and the relevant paragraphs of the Courts Notice.

The Commission must 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 first. In the spirit of the independence of the courts³⁸, the Commission must not consider the *merits* of case before the national court and any assistance it gives is *non-binding*. The non-binding nature of the opinion will be discussed in more detail below.

In terms of procedure, the opinion is drafted by the European Competition Network unit (A-5) in the Directorate-General for Competition (DG COMP) unless a related investigation is on-going elsewhere in the Commission, when it will be referred to the relevant department. The unit formally consults the European Commission Legal Service before giving the opinion³⁹. The Courts Notice sets the Commission a target deadline of four months in which to provide the opinion. For transparency, the Commission intends to post its opinions on DG COMP's website once it has received a copy of the final national court judgment in the case as required under Article 15(2) of Regulation 1/2003 - although notably to date none of the Commission's opinions have been posted.

To facilitate the monitoring of the application of EC 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 81 or 82 of the EC Treaty, "without delay" after the decision has been communicated to the parties.⁴⁰ The obligation does not extend to decisions by national courts *not* to apply Articles 81 and 82. It should be noted that the obligation falls on the Member State to transmit a copy of a judgment to the Commission,

³⁷ The possibility of asking for a Commission opinion was also included in the old Courts Notice (1993), 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), where it was characterised as an "interim opinion" giving "useful guidance". See Komninos, A P (2008) EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts, Hart: Oxford and Portland, p. 94, footnote 398, for instances of its use prior to Regulation 1/2003.

³⁸ As affirmed by paragraph 19 of the Courts Notice (n. 6)

³⁹ According to interview with a DG COMP official on the European Competition Network, 13 July 2006, Brussels

⁴⁰ National court judgments database at

<http://ec.europa.eu/comm/competition/elojade/antitrust/nationalcourts/index.cfm>

rather than on the court giving judgment.⁴¹ In practice it is usually the NCA that informs the Commission of a case, although this is a matter for national law and procedure⁴². 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.⁴³ In other Member States, the national provisions have undergone reform clarifying the legal channel for communication of court judgments⁴⁴.

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. In 2005, the Commission provided information in three cases.⁴⁵ Any exchange of information is subject to professional secrecy safeguards under Article 287 EC and Article 28 of the Modernisation Regulation. 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*⁴⁶, which affirmed

⁴¹ Such an obligation on courts was mooted in the drafting of the Modernisation Regulation – see Council Secretariat to national delegations (n. 14)

⁴² This channel of communication was partly modelled on the German system, section 90 of the Gesetz gegen Wettbewerbsbeschränkungen, with the important difference that the GWB imposes a duty on the national court hearing a case between private parties which impacts on competition to inform the Bundeskartellamt. Section 90a incorporates the provisions of Article 15 Regulation 1/2003 itself into the German law.

⁴³ Available at http://www.justice.gov.uk/civil/procrules_fin/contents/practice_directions/competitionlaw_pd.htm (accessed 12.5.2008)

⁴⁴ Supplement to European Commission XXXVth Annual Report on Competition Policy 2005: Application of the EC competition rules by national courts, p. 100. Available at http://ec.europa.eu/comm/competition/annual_reports/2005/report_supplement_20061113.pdf

⁴⁵ European Commission Annual Report on Competition Policy 2005 [SEC(2006)761 final], 15.6.2006, p. 73. Available at http://ec.europa.eu/comm/competition/annual_reports/2005/en.pdf

⁴⁶ T-353/94 *Postbank v Commission* [1996] ECR II-921

that co-operation between the Commission and Member States courts must not undermine EU guarantees of the protection of business secrets.

Article 15(3) 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 81 or Article 82 of the Treaty so requires*”. 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. In the interests of consistent application of the competition rules and to avoid conflicting opinions in the same case, 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 obligation on the national court itself. Paragraphs 32-35 of the Courts Notice elaborate (see Appendix).

It is instructive to look at the pre-legislative history of Article 15 to discover the Commission’s motivation for including the amicus curiae provision. The Commission staff working paper on amicus curiae briefs⁴⁷ characterises private parties as “private enforcers of the public interest” when they bring a claim before a national court under Articles 81 and 82. 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.⁴⁸ It 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). 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”.⁴⁹

⁴⁷ n.35

⁴⁸ n.35, para 8

⁴⁹ n.35, footnote 4 on p. 4

Amicus curiae briefs are intended to be a complement to preliminary references under Article 234 EC, as a means of alerting national judges to decisions in other Member State courts or to deal with new points of law.⁵⁰ The Commission views amicus curiae submissions as a means of safeguarding the public interest. It would become aware of a case either through the ECN – an 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 the Member State is 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,⁵¹ where the impact on consistency is likely to be the greatest. To the author's knowledge, the Commission has used the amicus curiae instrument only twice so far. It presented oral as well as written observations to the Paris Cour d'Appel on the interpretation of quantitative selective distribution under the motor vehicle block exemption regulation (Commission Regulation (EC) No. 1400/2002) in *Garage Grémeau v Daimler Chrysler*⁵². The second case is pending in Amsterdam Court of Appeal while an ECJ preliminary ruling on the admissibility of the Commission's intervention is sought (see table below).

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 constraint of national procedural law, may decide how much weight to give to that submission as, like a Commission opinion, it is not formally binding. The following section considers national judgments applying articles 81 and 82 EC, focusing on cases where the Commission gave an opinion, and the impact of that advice in the main proceedings.

⁵⁰ n.35, para 10

⁵¹ n.35, para 22

⁵² Case 05/17909, Paris Court of Appeal judgment of 7 June 2007

Methodology: national judgments applying EC antitrust rules

The first question is whether national judges are in fact applying EC competition law in parallel with national law where the case may concern trade between Member States. Although they are obligated to do so, in practice national provisions may not facilitate parallel application. Whereas approximation of national antitrust legislation with the wording of the EC legislation is voluntary, it is instructive to note that 23 Member States are fully convergent; Cyprus and Romania have proposals under consideration, and there is no formal convergence in Italy and Latvia.⁵³ To date, since 1 May 2004 when the Modernisation Regulation came into force, the Commission has posted copies of 168 national court judgments in its database⁵⁴. The majority of those judgments arose from private enforcement cases, primarily seeking annulment of obligations under an agreement or contract on the grounds of incompatibility with Articles 81. 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.

It is highly likely that there are 'hidden' cases in Member State jurisdictions which have not yet been notified to the Commission - for example, the House of Lords judgment in *Inntrepreneur v Crehan* is mentioned on the DG COMP website but not in the database - or where the database has not been updated.. There are some inconsistencies between the database and the report on the application of the EC competition rules by national courts in the supplement to the Commission's 2005 and 2007 Annual Reports on Competition Policy (the most recent reports giving detailed information on cases). 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

⁵³ European Competition Network Working Group on Cooperation Issues: results of the questionnaire on the reform of Member States' national competition laws after EC Regulation No. 1/2003 as of 27 November 2007 (convergence with Art 3.2). Available at

http://ec.europa.eu/comm/competition/ecn/ecn_convergencequest_28112007.pdf

⁵⁴ National court judgments database – n. 40, accessed 23.7.2008

decision on fines, and must refer to the Marknadsdomstolen (Market Court). Taken at face value, the figures in the database show no cases at all applying EC antitrust rules in half of the Member States.

Further investigation is needed to uncover the reasons for this. It could be that in some countries there is greater enforcement through the national competition authority rather than the courts. Furthermore, Member States recently reforming their competition law may have 'Europeanised' the national rules, with the result that EC competition rules are not explicitly pleaded by the parties; although national judges should be applying EC competition rules alongside national ones (*Van Schijndel*).⁵⁵ It should also be remarked that the obligation to notify a judgment to the Commission does not extend to decisions of national courts *not* to apply Article 81 and 82 EC where they find no effect on trade between Member States.

Cases where the Commission's opinion was sought: Article 15(1)

National courts requested opinions from the European Commission concerning the application of EC competition rules in six cases during 2005 - three from Belgium courts, two from Spain, and one from Lithuania - and three requests were pending at the end of 2005.⁵⁶ One of those requests, from a Dutch judge, was answered in 2006. It is unclear what happened to the other two pending cases. The Commission received two further requests in 2006, from a Belgian judge and a Swedish judge respectively.⁵⁷ In 2007, it issued opinions in two Swedish case and in one Spanish case.⁵⁸ According to a Commission official (writing in a personal capacity) (Gippini Fournier, FIDE 2008, p. 467), to date 19 opinions have been requested from national courts and the Commission has delivered in all of them. I have been able to locate 11 cases, with varying degrees of success in identifying the parties and in tracing the proceedings in the national jurisdictions. This in itself demonstrates a certain lack of transparency. All of the located cases are summarised in the table below.

⁵⁵ In a recent Czech case (*Tupperware*), the Brno Regional Court ruled against a decision of the Office for the Protection of Competition, finding that it is not possible to declare a concurrent breach of Czech and Community competition laws. The appeal is pending. See Kindl, J,e-Competitions, no 19984, 1 November 2007

⁵⁶ Annual Report 2005 (n.45), para 219, p. 73

⁵⁷ European Commission Annual Report on Competition Policy 2006, COM (2007) 358 final, p. 33. Available at http://ec.europa.eu/comm/competition/annual_reports/2006/en.pdf

⁵⁸ Commission Staff Working Document, SEC (2008) 2038, Brussels, 16 June 2008, p. 101- Annex To The European Commission Annual Report On Competition Policy 2007, Com(2008) 368

In each case I aim to discover what questions were asked of the Commission, the content of the Commission's opinion, and how it was applied by the judge in the national proceedings. The objective is to establish whether national judges use this tool, and if so in what circumstances; the nature of the Commission's advice for example purely factual, economic or legal; the impact of the Commission's opinion on the judge and how closely s/he follows it; the extent to which this tool contributes to the consistent application of the EC rules; and its relationship with or implications for the judicial preliminary reference procedure.

Given that the Commission has not yet published its opinions in individual cases, it is not an easy task to match up the cases where the Commission has delivered an opinion with the corresponding national judgments applying EC antitrust rules, especially where the parties are not disclosed in the national court judgments database for confidentiality reasons. However, this has been possible for the Belgian cases in particular, as they are mentioned in some detail in the Belgian Competition Council's Annual Report 2004, which was published in February 2006 and includes a 2005 overview.

TABLE OF LOCATED CASES

Case name	Member State	Court	Sector	Facts	Commission advice/intervention as amicus curiae	Date Commission opinion sought (1), delivered (2), judgment delivered (3)
<u>OPINION</u> Emond v Brasserie Hacht 2004/MR/6	Belgium	Brussels Court of Appeal (referred from Liège Court of Appeal on 9.9.2004) ⁵⁹	Beer ties	Brewery, Brasserie Hacht, concluded 10-yr exclusive purchasing agreement (EPA) for beer with buyer, Emond, in 1993. In 1997 then concluded 5-yr EPA for beverages other than beer. Brewery had been guarantor of Emond's bank	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 ⁶⁰ , block exemption notifications (Reg 1984/83 ⁶¹ expired 31.5.2000,	4.2.2005 (2) 23.6.2005 (3)

⁵⁹ The Court of Appeal in Brussels asked for the Commission's opinion in 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, without prejudice to their right to refer questions to the ECJ under Article 234 EC, and it is in this context that the Commission's guidance was sought. The Belgian Competition Council and the Corps des Rapporteurs could also submit written observations to the Brussels Court of Appeal within fixed deadlines. The competence to deliver preliminary rulings has since been transferred to the Belgian Cour de Cassation: Art 72-74 LPCE (in force 15 September 2006).

⁶⁰ 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, p. 13)

⁶¹ Commission Regulation (EEC) No. 1984/83 of 22 June 1983 on the application of Article 85(3) [now 81(3)] of the Treaty to categories of exclusive purchasing agreements (OJ L 173, 30.6.1983)

Case name	Member State	Court	Sector	Facts	Commission advice/intervention as amicus curiae	Date Commission opinion sought (1), delivered (2), judgment delivered (3)
				<p>loan, penalties in case of EPA breach. Bar out of business in Sept 1999; Emond claimed brewery shared liability. Court decided relevant point was 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</p>	<p>subsequent Reg 2790/1999⁶²); ECJ's <i>Delimitis</i> on how to assess market foreclosure. On scope of nullity, ECJ <i>Courage</i> v <i>Crehan</i>⁶³.</p>	

⁶² 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)

⁶³ C-453/99 *Courage v Crehan* [2001] ECR I-6297

Case name	Member State	Court	Sector	Facts	Commission advice/intervention as amicus curiae	Date Commission opinion sought (1), delivered (2), judgment delivered (3)
SABAM v Productions & Marketing 2004/MR/7	Belgium	Brussels Court Appeal (referred from Brussels Commercial Court)	Collecting of societies	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 81. Emond unsuccessful. P&M, concert organiser, had to obtain copyright licences from SABAM, collecting society protecting music right-holders. Only SABAM issued licences in Belgium. It refused to grant P&M status of 'grand organisateur', denying benefit of 50% reduced tariff.	Q: compatibility with Art 82, esp. discrimination (82(c), of collecting society's criteria for granting status of 'grand organisateur' entitling 50% rebate on royalties payable. Com referred to its decisional practice in sector, rehearsing factors	4.2.2005 (2) 3.11.2005 (3)

Case name	Member State	Court	Sector	Facts	Commission advice/intervention as amicus curiae	Date Commission opinion sought (1), delivered (2), judgment delivered (3)
				<p>P&M contested bills, SABAM initiated proceedings. P&M argued that SABAM abused its 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> <p>As SABAM was the only operator of its kind in Belgium, market entry likely to be more difficult for</p>	<p>which can be taken into account to assess whether criteria themselves, or their application, may breach Art 82. Com referred to Belgian as well as EC 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.</p>	

Case name	Member State	Court	Sector	Facts	Commission advice/intervention as amicus curiae	Date Commission opinion sought (1), delivered (2), judgment delivered (3)
				<p>competing concert organisers from other Member States. SABAM's conditions for grand organisateur status: professional organisation organising events regularly; pay min BEF500000 p.a. for copyright over 3 yrs; no litigation over past 3 yrs; produce articles of association</p> <p>Court found criteria lacked clarity and transparency, specifically designed to discriminate – criteria not public, unwritten, unknown</p>		

Case name	Member State	Court	Sector	Facts	Commission advice/intervention as amicus curiae	Date Commission opinion sought (1), delivered (2), judgment delivered (3)
Wallonie Expo v FEBIAC 2004/MR/8	Belgium	Brussels Court of Appeal (referred from Brussels Commercial Court)	Trade fairs	in advance. Excessive differential between tariffs paid for copyright, and SABAM gave no objective or economic justification. Breach of Art 82.	Commercial Court did not mention EC law in reference to Court of Appeal, maintained that relevant geographic market national, so only Belgian law applicable. However,	Q: compatibility of Arts 81&82 with agreement between organiser of truck exhibition, WEX, and federation of truck exhibitors, importers and distributors, FEBIAC, not to take part in any similar

⁶⁴ Annual Report 2005 (n.45), p.75

Case name	Member State	Court	Sector	Facts	Commission advice/intervention as amicus curiae	Date Commission opinion sought (1), delivered (2), judgment delivered (3)
				<p>Competition Council submitted written observations that capable of affecting trade between Member States, Court of Appeal agreed.</p> <p>Court noted agreement capable of restricting competition in 3 ways: manufacturers, distributors, providers of heavy utility vehicles could not promote products in 6 mths before FEBIAC exhib; distributors, dealers were in</p>	<p>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.</p> <p>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 81</p> <p>Recalling its decisional practice in sector, Com</p>	

Case name	Member State	Court	Sector	Facts	Commission advice/intervention as amicus curiae	Date Commission opinion sought (1), delivered (2), judgment delivered (3)
				<p>different competitive situation depending on whether manufacturers, importers in the exhib; in 6 mth prohibition period exhib organisers could not guarantee participation of potential exhibitors also wanting to show at FEBIAC exhib.</p> <p>However, relevant market was national, option remained for exhibitors to participate in events abroad. Not 81(1) unlawful. But, fact that FEBIAC held dominant position on market for provision</p>	<p>noted it had generally exempted prohibition clauses in regulation of fairs and exhibs on basis of 81(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 foreclosing competitors.</p> <p>Opinion clarified relationship between Art 81&82</p>	

Case name	Member State	Court	Sector	Facts	Commission advice/intervention as amicus curiae	Date Commission opinion sought (1), delivered (2), judgment delivered (3)
				<p>of services linked to the organisation of exhibitions of utility vehicles in Belgium meant that it was capable of influencing behaviour of other firms and had special responsibility not to restrict competition. The 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 82.</p>	<p>and indicated that efficiencies can be considered in Art 82 assessments.⁶⁴</p>	

Case name	Member State	Court	Sector	Facts	Commission advice/intervention as amicus curiae	Date Commission opinion sought (1), delivered (2), judgment delivered (3)
<i>Unknown</i>	Belgium	Antwerp Court Appeal	Ports of	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.	<p>Q: compatibility with Art 82 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.</p> <p>Com laid out case law on exploitative abuses and unfair trading conditions under 82(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</p>	

Case name	Member State	Court	Sector	Facts	Commission advice/intervention as amicus curiae	Date Commission opinion sought (1), delivered (2), judgment delivered (3)
<i>Unknown</i>	Spain	<i>Unknown</i>	Retail sale of automotive fuel	Whether service station operator could use Art 81 as a defence to be	<p>been effective competition. Further, Court should consider whether restrictive effects of contractual clause went beyond objective to be achieved - principle of proportionality. Liability clause should be considered in context of whole contract and relevant circumstances.</p> <p>Q: whether size and nature of network of Spanish supplier could affect trade</p>	

Case name	Member State	Court	Sector	Facts	Commission advice/intervention as amicus curiae	Date Commission opinion sought (1), delivered (2), judgment delivered (3)
				released from a contractual obligation.	between Member States; whether exclusive supply contract between the parties could be exempt under 81(3). Com indicated how network of exclusive supply contracts can lead to foreclosure, outlined how to assess in line with <i>Delimitis</i> , its own guidelines and notices, and Art 27(4) notice ⁶⁵ published in its <i>REPSOL</i>	

⁶⁵ 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."

Case name	Member State	Court	Sector	Facts	Commission advice/intervention as amicus curiae	Date Commission opinion sought (1), delivered (2), judgment delivered (3)
<i>Unknown</i>	Spain	<i>Unknown</i>	Retail sale of automotive fuel		<p>investigation⁶⁶. Re exemption, Com simply referred to its 81(3) guidelines. Q: compatibility with Art 81 of non-compete clause, specifically resale price maintenance (RPM) clause, whether the agreement could be covered by block exemption, and whether service station operator could be defined as an agent.</p> <p>As above, Com referred to <i>Delimitis</i>, its own guidelines</p>	

⁶⁶ COMP 38.348 – REPSOL, OJ C 258, 20.10.2004, p. 7-11

Case name	Member State	Court	Sector	Facts	Commission advice/intervention as amicus curiae	Date Commission opinion sought (1), delivered (2), judgment delivered (3)
					<p>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 its guidelines.</p> <p>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</p>	

Case name	Member State	Court	Sector	Facts	Commission advice/intervention as amicus curiae	Date Commission opinion sought (1), delivered (2), judgment delivered (3)
UAB Tew Baltija	Lithuania	Vilnius District Court	Public tender	Applicant had argued that long-term exclusivity would allow tender winner to abuse dominant position by charging excessive prices to certain clients.	contract or whether it vitiated contract as a whole. Q: compatibility with Art 86(1) & Art 82 of municipality carrying out public tender procedure for exclusive 15 yr waste collection contract. Com gave sectoral advice, referring to Art 82 waste management cases <i>Københavns</i> and <i>Dusseldorp</i> , and Com notice on definition of relevant market ⁶⁷ . In <i>Københavns</i> ,	

⁶⁷ OJ C 372, 9.12.1997, p. 1

⁶⁸ Annual Report 2005 (n.45), p. 77

Case name	Member State	Court	Sector	Facts	Commission advice/intervention as amicus curiae	Date Commission opinion sought (1), delivered (2), judgment delivered (3)
Brasseries Kronenbourg v SARL JBEG 02/01205	France	Strasbourg Tribunal de Grand Instance (first instance civil court, commercial	Beer ties	Bar tenant respondent, JBEG, requested stay of proceedings to seek Com opinion on whether cumulative effect of agreements	breach of EC competition rules was justified under Art 86(2) relating to public undertakings. Substantial standard of proof for finding breach of Art 82 or 86(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”. ⁶⁸	4.2.2005

Case name	Member State	Court	Sector	Facts	Commission advice/intervention as amicus curiae	Date Commission opinion sought (1), delivered (2), judgment delivered (3)
		chamber)		in national market amounts to effect on trade between Member States; whether distribution agreement covered by block exemption Reg 2790/99. Judge refused respondent's request, noting that national courts are empowered under Art 6 Mod Reg to apply EC competition rules.		
Danska Staten genom Bornholmstrafiken v Ystad Harnn Logistik Aktiebolag Case T-2808/05	Sweden	Swedish Supreme Court (on appeal from Ystad District Court)	Ports	Port of Ystad allegedly abused its dominant position by charging excessive prices for port services. Com opinion took	Q: definition of the relevant market Com stated that its opinion was not binding, would not carry out independent	18.10.2006 (1) 1.3.2007 (2) [taking longer than target 4mths in Courts

Case name	Member State	Court	Sector	Facts	Commission advice/intervention as amicus curiae	Date Commission opinion sought (1), delivered (2), judgment delivered (3)
				<p>similar 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.</p>	<p>assessment of market or consider merits of case, only clarify criteria and evidence for determining relevant market.</p> <p>Com advised should define market according to whether or not other ports were substitutes, referred to ECJ and Commission decisional practice in assessing demand and supply substitution.</p> <p>National court should decide whether port services offered</p>	notice]

Case name	Member State	Court	Sector	Facts	Commission advice/intervention as amicus curiae	Date Commission opinion sought (1), delivered (2), judgment delivered (3)
Övertorneå kommun m.fl. v Ekfors Kraft AB m.fl. A 4/06	Sweden	Swedish Market Court	Public tender		would constitute single or several markets, whether other ports could provide same "capacities, facilities and services" for ferry operators and end users. ECJ had previously found that organisation of port activities in a single port may constitute a relevant market. Q: whether municipalities should have standing in a domestic court under the Swedish Competition Act	21.12.2006 (1)
Praet en Zonen v	Netherlands	The Hague	Agricultural	Mussel seed quota	Q: whether the EC	?.?.2005(1)

Case name	Member State	Court	Sector	Facts	Commission advice/intervention as amicus curiae	Date Commission opinion sought (1), delivered (2), judgment delivered (3)
Cooperatieve Producentenorganisatie van de Nederlandse Mosselcultuur UA		Court of Appeal	of quotas	allocations by an association of mussel farmers. The Dutch judge asked the Commission	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.	??.2006(2) ⁶⁹
<u>AMICUS CURIAE</u>						
Garage Grémeau v France Daimler Chrysler 05/17909		Paris Court of Appeal	Car dealerships	The case arose out of Daimler Chrysler France's refusal to renew an agreement with Grémeau, a car	Reason for Com intervention? Potential erroneous interpretation of quantitative	7.6.2007 (3)

⁶⁹ Annual Report on Competition Policy 2006, Commission staff working document, SEC(2007) 860, Brussels 25 June 2007 p. 89, 2.1.1. Available at http://ec.europa.eu/comm/competition/annual_reports/2006/part2_en.pdf

Case name	Member State	Court	Sector	Facts	Commission advice/intervention as amicus curiae	Date Commission opinion sought (1), delivered (2), judgment delivered (3)
X BV v Inspecteur Belastingdienst 06/00252, LJN BB3356 First instance in Haarlem District Court, 22.5.2006, AWB 05/1452, LJN AX7112	Netherlands	Amsterdam Court of Appeal (first instance in Haarlem District Court)	Tax	dealer. The Court of Appeal did not rule on the merits but suspended the case pending criminal proceedings brought by Daimler Chrysler against Garage Gremeau for forgery and fraud.	selective distribution scheme by French Supreme Court (Cour de Cassation) earlier in the case - requiring suppliers to apply objective criteria for selection of dealers even where they use only a quantitative, as opposed to qualitative, selection system.	12.9.2007 (3) - preliminary ruling pending in ECJ C-429/07 (OJ C 297/37, 8.12.2007 -
				Tax deductibility of profit from a fine imposed as a result of an infringement of EC competition law. Substantive scope for Com intervention as amicus curiae under Art 15 Mod	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	

Case name	Member State	Court	Sector	Facts	Commission advice/intervention as amicus curiae	Date Commission opinion sought (1), delivered (2), judgment delivered (3)
				<p>Reg - wider than questions on direct application of Arts81&82?</p> <p>Court considered recital 21 Mod Reg and paras 31 & 35 Courts notice. Considered that duty of loyal co-operation between Commission and Member States in Art 10EC and the principle of effectiveness, explicitly mentioned in para 35, suggest that scope for Com intervention could be wider. As interpretation of Art 15 Mod Reg could</p>	81 and 82 EC.	application lodged on 22.5.2006)

Case name	Member State	Court	Sector	Facts	Commission advice/intervention as amicus curiae	Date Commission opinion sought (1), delivered (2), judgment delivered (3)
				be ambiguous, referred to ECJ for preliminary ruling, now pending.		

Implications of a Commission intervention in national court proceedings

Evidence issues

As stated in the Courts notice, the Commission may not hear the parties before formulating its opinion. In safeguarding the independence of the Court by not consulting the parties prior to giving its opinion, 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 in how that request is drafted, and secondly, after the national judge receives the Commission's intervention. As the process is not in front of the parties, the national court may rely on the Commission's opinion without cross-examination. As such, it is arguable that the rights of the defendant to a fair trial could be unduly restricted or prejudiced.⁷⁰ 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 raises concerns for the parties' rights depends 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. Paragraph 30 of the Courts Notice states that courts must deal with the Commission's opinion in accordance with the relevant national procedural rules, but that they must respect the general principles of Community law. In some Member States, the parties have rights to be heard on the interventions of NCAs. For example, in France where a court requests an opinion from the Conseil de la Concurrence 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.

⁷⁰ Francis, BPB (1995) 'Subsidiarity and Antitrust: the enforcement of European competition law in the national courts of Member States', 27 *Law and Policy of International Business* 247-276, at p. 272. Although this article relates to the superseded 1993 Courts Notice, the author's observation still holds.

In *Brasseries Kronenbourg*, 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, noting that national courts are empowered under Article 6 of the Modernisation Regulation to apply EC competition rules. Although the court did not explicitly say so, this implies that it is not a right of the parties to seek an opinion (cf *Grimaldi* above), but a tool at the disposal of the judge only.

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 15(1), suggesting that it was open to negotiation and that the parties' wishes were paramount.⁷¹

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.⁷² Alternatively, it could have the status of expert evidence perhaps 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."⁷³ The Commission itself will not hear the parties. 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."⁷⁴

⁷¹ DG COMP report 'Overview of the application of the EC competition rules by national courts in 2006', p. 2. Available at <http://ec.europa.eu/comm/competition/elojade/antitrust/nationalcourts/Overview+of+the+application+of+the+EC+competition+rules.pdf>

⁷² Francis, (n.70)

⁷³ C-174/98P & C89/98P *Van der Wal and the Netherlands v Commission* [2000] ECRI-1, at 45

⁷⁴ Courts Notice (n.6), para 19

Given that opinions are excluded from actions for annulment under Article 230EC, they are only challengeable through the preliminary reference procedure, assuming the parties can convince the judge to refer, which may not be in their interests as a stay of proceedings will cause delay. According to *Simmenthal*,⁷⁵ it may be in the interests of the proper administration of justice that a question should be referred for a preliminary ruling only after both sides have been heard, but it is for the national court to assess whether that is necessary. This seems to relate to the stage of proceedings at which the court refers the question, rather than the parties' ability to scrutinise the preliminary question itself. If opinions are capable of influencing the outcome of cases in national courts, there should be closer scrutiny.

Relationship with the preliminary reference procedure?

The Commission's opportunity to issue a legal opinion on request from a national court is analogous to a, albeit non-binding, preliminary reference procedure under Article 234 EC. As mentioned above, the ECJ's preliminary reference procedure was previously the only institutional link between the national court and the EU institutions. In the Modernisation Regulation, we observe a parallel strengthening of links with the Commission as the primary enforcer of competition law. Referring to the original Notice on co-operation between the Commission and the national courts of 1993 following the ECJ's *Delimitis* judgment, one commentator accused the Commission of "giving itself the freedom to issue 'informal preliminary reference judgments', without respecting any procedural requirements."⁷⁶ However, any opinion sought from the Commission is without prejudice to the preliminary reference procedure itself.

Due to its non-binding nature, the Commission's guidance may cover economic and factual questions in addition to legal ones, and therefore in that sense has a broader scope than a preliminary ruling. The opinions delivered

⁷⁵ Case 70/77 *Simmenthal v Amministrazione delle Finanze* [1978] ECR 1453, 28.6.1978, at 10-11

⁷⁶ Wodz, B. 'Comfort letters and other informal letters in EC competition proceedings – why the story is not over' (2000) 21(3) *E.C.L.R.* 159-169

so far have covered both general points of law and sector-specific issues. For example, in the Lithuanian *UAB Tew Baltija* case, the Commission commented on the standard of proof needed to establish abuse of a dominant position, as well as pointing to its existing notices. The Vilnius District Court was faced with the compatibility with Article 86(1) and Article 82 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 82 waste management cases of *København*⁷⁷ and *Dusseldorp*⁷⁸, in addition to the Commission notice on the definition of the relevant market. In the *København* case, a breach of EC competition rules was justified under Article 86(2) EC relating to public undertakings. However, the Commission also stated that abuse by the successful concession-holder would have to be “*inevitable* or at least the *likely* result of tender conditions”.⁷⁹ This appears to stray onto judicial territory.

In the Spanish courts there have been a number of cases on retail sale of automotive fuel, accounting for 29 of the 33 national court judgments notified to the Commission to date. The two opinions sought reflect this, perhaps used as test cases. Interestingly, they were also the subject of parallel preliminary references to the ECJ. Both cases concerned the validity of supply contracts between petrol station operators and oil companies. In one of the cases, the Commission gave a 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. However, the Commission advised that it was for the Court to decide whether a clause it might find void could be severed from the contract or whether it vitiated the entire contract. This is a matter for the Member State’s contract law, and demonstrates the sometimes uneasy interaction

⁷⁷ Case C-209/98 *Entreprenørforeningens Affalds/Miljøsektion (FFAD) v Københavns Kommune* [2000] ECR I-3743

⁷⁸ Case C-203/96 *Chemische Afvalstoffen Dusseldorp BV and Others v Minister van Volkhuysvesting, Ruimtelijke Ordening en Milieubeheer* [1998] ECR I-4075

⁷⁹ Annual Report 2005 (n.45), p. 77

between contract and competition law. The ECJ has previously held⁸⁰ 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. However, this does not amount to a Community principle of severance, so the circumstances where it comes into effect are determined by national law.

In the Belgian SABAM case, 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 82 or whether they amounted to unlawful discrimination under that article (82(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 82. But significantly, the opinion referred to Belgian as well as EC jurisprudence on dominance. It is perhaps rather unusual and inappropriate for a judge to be educated in this way on his own Member State's law. Perhaps the Commission was attempting to demonstrate the similarity in national and Community law in this area. 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.⁸¹

The preliminary reference procedure has been characterised as a dialogue between courts⁸². Some might find it remarkable that a judge would seek an opinion or accept an intervention from the European Commission as a supranational administrative body. In this respect the distinction between opinions and amicus curiae interventions are strongest – it might be expected that judges would be more responsive to the former. This is especially true given that judges can find existing guidance in case law, Commission regulations, decisions, notices, and guidelines, while still safeguarding their

⁸⁰ C-56/65 *Societe Technique Miniere* [1966] ECR 235 and C-319/82 *Societe de Vente de Ciments et Betons de L'Est* [1983] ECR 4173. See Whish, R (2005) Competition Law, Oxford University Press, fifth edition, p.289-90 for a discussion.

⁸¹ Mentioned at p.6 of Brussels Court of Appeal's judgment

⁸² Alter, K. (1998) 'Explaining national court acceptance of European court jurisprudence: a critical evaluation of theories of legal integration' in Slaughter et al (n.21), 227-251

independence. 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. This latter point is encompassed in the possibility to request the Commission to transmit information. The fact that these two provisions were drafted in the same sentence of Article 15(1) suggests that the Commission did not intend opinions to have stand-alone legal significance. Nonetheless, DG COMP still formally consults the Commission Legal Service before giving its opinion.

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 appears that the Commission does not want to be too interventionist, but only 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.⁸³ However, in some cases it does go further – as already mentioned, in the Lithuanian case it commented on standard of proof, and it indicated Belgian domestic competition law provisions in *SABAM*. Regarding the amicus curiae intervention in *Daimler Chrysler*, the four-page interlocutory ruling itself does not specify the Commission's substantive input, so it is difficult to gain an insight into why the Commission intervened, and why it considered it necessary to make oral representations in the proceedings as well as written submissions, but it centred on the French Supreme Courts' earlier interpretation of the quantitative selective distribution scheme.⁸⁴ 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 81(3). As its 2006 Annual Report on

⁸³ Global Competition Review Report: Modernisation in Europe 2005, p.55, country report on Germany, answer to question 29.

⁸⁴ See case notes by Jérôme Philippe & Florence Kramer in *e-Competitions*, October 2007-II, and Noëlle Lenoir, Dan Roskis & Ch M Doremus in *e-Competitions* December 2007-I for a fuller discussion of the case

Competition suggests, the Commission's goal could also have been to encourage a preliminary reference to the ECJ for a binding ruling⁸⁵.

Referring to the Commission is less drastic and disruptive to proceedings than a reference to the ECJ. Lower courts in particular may be more likely to refer to the Commission, unless a national judge sees kudos in referring to the ECJ. Given the heavy caseload of the Community courts, the ECJ has developed a body of case law limiting unnecessary references, encouraging self-restraint of national courts. In respect of lower courts' discretionary references, the Advocate General in the *Wiener* case⁸⁶ suggested that lower courts should only refer where there was a question of general importance likely to promote uniform application of law throughout EU. Obligatory references from the highest courts are constrained by the conditions in *CILFIT*⁸⁷: no duty to refer where the question is irrelevant; where it is materially identical to a previous ruling; where the issue is not strictly identical but the question has been decided previously (*acte éclairé*); or where correct application of EU law is so obvious that it leaves no reasonable doubt as to how it should be applied (*acte clair*). Commission opinions could contribute to alleviating the case load.

There may be a number of reasons for a court to take advantage of the opportunity to request a Commission opinion. The first and most obvious 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. For example, the Spanish Tribunal Supremo 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.⁸⁸ The

⁸⁵ Annual report 2006 staff working document (n.69), p. 90

⁸⁶ C-338/95 *Wiener v Hauptzollamt Emmerich* [1997] ECR I-6495, at 18 (otherwise known as the 'nightdresses' case...)

⁸⁷ C-283/81 *CILFIT* [1982] ECR 3415

⁸⁸ Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA*. The court stipulated that a resale price maintenance clause was not covered by block exemption.

ECJ's ruling was delivered on 14 December 2006, at least a year after the questions put to the Commission in the same cases (mentioned above). In competition cases involving financial loss, time is of the essence.

Another possible incentive relates to Member States' domestic institutional relationships between executive agencies and the judiciary. By asking for information directly from the Commission, a national court can bypass its own NCA, which could otherwise raise the case relatively informally within the Network. Most Member States have provision in their national law to seek advice from the NCA. In some Member States, there is already a tradition of interventions from the national competition authorities, which may make these Member States more likely to make use of Article 15. According to the ECN's convergence survey⁸⁹, five Member States (Belgium, Bulgaria, Italy, Malta, Luxembourg) are 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 have provisions through intervention of the NCA. In some cases, present rules are deemed sufficient (Austria), in Cyprus the Supreme Court will issue a Procedural Order, in the Czech Republic there are no specific rules but *amicus* interventions are possible according to the code of civil procedure. Denmark, Finland and Spain confirmed that there is no specific rule on the operation of Article 15(3), but there is no legal obstacle to its application.

In the negotiations around the drafting of Article 15 of the Regulation, some Member States proposed that their national competition authorities act as intermediaries between the courts and the Commission, but others were opposed. National judges may be more comfortable with obtaining information themselves rather than through an intermediary.

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

⁸⁹ n.53

of economic, factual or legal questions without the need to draft the questions in a certain way.

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 case. A request for an opinion from the Commission could have a more proportional significance (less 'using a sledge hammer to crack a nut?'). However, judicial preferences and traditions may vary between Member States⁹⁰.

Commission opinions are unlikely to threaten the relevance of the preliminary reference procedure since the ECJ remains the ultimate interpreter of European law, nor to provide the Commission with a guaranteed means of control over national courts' application of antitrust rules, for the fundamental reason that they are explicitly non-binding. Rather, this mechanism can play a complementary role and contribute to consistency. As discussed above, a Commission opinion could become binding indirectly through the national court's judgment if it follows the Commission's advice to the letter. This could happen, for instance, where the judge may be less experienced in competition law or at judging economic evidence, where the court is more willing to apply an interpretation of Community law by a Community institution (albeit from the Commission rather than the ECJ), or for reasons of convenience – if the Commission's 'expert' interpretation seems reasonable, there may be little incentive to look for an alternative. The judgment would be effective between the parties, but a universal binding effect (*erga omnes*) could result if a principle expressed in a Commission opinion then becomes a precedent in the national case law. 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".⁹¹ That would support an *erga*

⁹⁰ Mattli, W & Slaughter, A-M (1998) 'The role of national courts in the process of European integration: accounting for judicial preferences and constraints' in Slaughter et al (n.21), 253-276.

⁹¹ Nederlandse Mededingings Autoriteit Amicus Curiae Guidelines (2004), point 38. Available at: http://www.nmanet.nl/Images/14_27829_tcm16-75171.pdf

omnes effect, which is desirable if the aim is to promote consistent application of the rules across Member States.

Concluding remarks

In the absence of a formal judicial network to promote consistent application, following decentralised enforcement of the EC antitrust rules, the Commission, as primary enforcer of competition law, has attempted to complement the formal judicial link of the preliminary reference procedure with a parallel strengthening of its own relations with the national courts, based on the duty of loyal co-operation inferred by the ECJ from Article 10 EC. This judicial-administrative relationship at the institutional nexus of public and private enforcement is important for the overall success of the competition enforcement regime.

This paper has considered how one tool under the Modernisation Regulation, the opportunity for a national court to request an opinion from the European Commission, has been used by national courts when applying EC antitrust rules under Articles 81 and 82 EC. Considering the opinions delivered so far, it appears that the Commission is not taking a heavy-handed approach. Where it considers that the consistent application of EC antitrust rules is under threat, it has shown itself willing to intervene (albeit only once so far) as *amicus curiae*. If the Commission sees divergent application of the rules, it may be more likely to start intervening with *amicus curiae* briefs, which it can submit without waiting for a national court's request. It is unlikely to usurp the authority of the ECJ, for the fundamental reason that its opinions are explicitly non-binding. Indeed, it may want to encourage references to the ECJ, as it claimed in its Paris Cour d'Appel *amicus curiae* intervention.

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. Publication of the opinions is desirable on the basis of legitimacy and legal certainty, and, from a more practical perspective, if Commission opinions are to have maximum

impact in promoting convergent application of EC antitrust rules among national judges.

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, and whether any evidentiary issues might arise under national procedural law and rules of evidence.

If the European Commission succeeds in its goal of increasing private enforcement as expressed in its White Paper on damages actions, it will be all the more important to consolidate consistent application from the outset. It will also require monitoring of national court judgments applying EC antitrust rules, as the vast majority will not resort to the Commission or to the ECJ.

The legal effect of an opinion to a court appears to be uncertain, especially as this type of opinion may be *sui generis*. Nonetheless, 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 *inter partes*, but an *erga omnes* effect could result if a principle expressed in a Commission opinion then becomes a precedent in the national case law. If the Commission were to publish its opinions, it would strengthen their *erga omnes* effect, which is desirable if the aim is to promote consistent application of the rules across Member States. 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 have the Commission influence national judgments 'by the back door'.

APPENDIX: Article 15 of the Modernisation Regulation and relevant paragraphs of the Courts Notice

**Article 15
Cooperation with national courts**

1. In proceedings for the application of Article 81 or Article 82 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.

2. Member States shall forward to the Commission a copy of any written judgment of national courts deciding on the application of Article 81 or Article 82 of the Treaty. Such copy shall be forwarded without delay after the full written judgment is notified to the parties.

3. Competition authorities of the Member States, acting on their own initiative, may submit written observations to the national courts of their Member State on issues relating to the application of Article 81 or Article 82 of the Treaty. With the permission of the court in question, they may also submit oral observations to the national courts of their Member State. Where the coherent application of Article 81 or Article 82 of the Treaty so requires, the Commission, acting on its own initiative, may submit written observations to courts of the Member States. With the permission of the court in question, it may also make oral observations.

For the purpose of the preparation of their observations only, the competition authorities of the Member States and the Commission may request the relevant court of the Member State to transmit or ensure the transmission to them of any documents necessary for the assessment of the case.

4. This Article is without prejudice to wider powers to make observations before courts conferred on competition authorities of the Member States under the law of their Member State.

Paragraphs 27-30 of the Courts Notice on request for an opinion on questions concerning the application of EC competition rules (Article 15(1))

27. When called upon to apply EC competition rules to a case pending before it, a national court may first seek guidance in the case law of the Community courts or in Commission regulations, decisions, notices and guidelines applying Articles 81 and 82 EC. Where these tools do not offer sufficient guidance, the national court may ask the Commission for its opinion on questions concerning the application of EC competition rules. The national court may ask the Commission for its opinion on economic, factual and legal matters. The latter is of course without prejudice to the possibility or the obligation for the national court to ask the Court of Justice for a preliminary

ruling regarding the interpretation or the validity of Community law in accordance with Article 234 EC.

28. In order to enable the Commission to provide the national court with a useful opinion, it may request the national court for further information. In order to ensure the efficiency of the co operation with national courts, the Commission will endeavour to provide the national court with the requested opinion within four months from the date it receives the request. Where the Commission has requested the national court for further information in order to enable it to formulate its opinion, that period starts to run from the moment that it receives the additional information.

29. When giving its opinion, the Commission will limit itself to providing the national court with the factual information or the economic or legal clarification asked for, without considering the merits of the case pending before the national court. Moreover, unlike the authoritative interpretation of Community law by the Community courts, the opinion of the Commission does not legally bind the national court.

30. In line with what has been said in point 19 of this notice [regarding independence of the national court] the Commission will not hear the parties before formulating its opinion to the national court. The latter will have to deal with the Commission's opinion in accordance with the relevant national procedural rules, which have to respect the general principles of Community law.

Paragraphs 32-35 of the Courts Notice on the Commission's submissions of observations to the national court (Article 15(3))

32. The regulation specifies that the Commission will only submit observations when the coherent application of Articles 81 or 82 EC so requires. That being the objective of its submission, the Commission will limit its observations to an economic and legal analysis of the facts underlying the case pending before the national court.

33. In order to enable the Commission to submit useful observations, national courts may be asked to transmit or ensure the transmission to the Commission of a copy of all documents that are necessary for the assessment of the case. In line with Article 15(3), second subparagraph, of the regulation, the Commission will only use those documents for the preparation of its observations.

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.

35. The procedural framework should respect the principles set out in point 10 of this notice. That implies amongst others that the procedural framework for the submission of observations on issues relating to the application of Articles 81 or 82 EC

(a) has to be compatible with the general principles of Community law, in particular the fundamental rights of the parties involved in the case;

(b) cannot make the submission of such observations excessively difficult or practically impossible (the principle of effectiveness)(Hoescht⁹²); and

(c) cannot make the submission of such observations more difficult than the submission of observations in court proceedings where equivalent national law is applied (the principle of equivalence).

⁹² Joined cases 46/87 and 227/88 *Hoescht* [1989] ECR 2859 at 33