

**THE ‘JUDICIAL’, THE ‘ADMINISTRATIVE’ AND CONSISTENT APPLICATION  
AFTER THE DECENTRALISATION OF EC ANTITRUST ENFORCEMENT**

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**Abstract**

This paper addresses a lesser-explored dimension of the 2004 EC competition reforms – side effects of the methods chosen for ensuring Community-wide consistent and effective application of the antitrust rules among national judges in the era of decentralised enforcement. I argue that the European Commission and national competition authorities appear to be assuming more traditionally judicial functions. The paper explores two examples where this tendency is in evidence: (a) interpretative/normative rulings: the Commission’s opportunity to give an opinion in a national court case; and (b) precedent-setting: in certain circumstances, decisions of competition authorities are binding on national courts. The expertise of administrative agencies in competition law enforcement, in particular the historical primacy of the Commission, may be offered as an alternative source of legitimacy to traditional legal notions. These developments may have broader implications for the interaction between administrative agencies and the judiciary.

## I. INTRODUCTION

This paper addresses a lesser-explored dimension of the EC competition reforms of 2004 – side effects of the methods chosen for ensuring Community-wide consistent application of the competition rules among national judges in the era of decentralised enforcement.

Decentralisation of enforcement of Articles 81 and 82 EC under the 2004 Modernisation Regulation<sup>1</sup> has led to an increase in the powers and jurisdiction of national competition authorities (NCAs) and national courts.<sup>2</sup> While it may lead to more efficient and effective control of competition law infringements by those bodies closest to the facts, according with the principle of subsidiarity, this decentralisation carries with it potentially greater risks of divergent application of EC antitrust rules. Such divergent application could manifest itself in various ways through what might be termed substantive divergence, such as differing interpretations of EC competition law, conflict between EC and national law, or conflict between competition and other policy areas. However, another aspect of differentiated application is institutional divergence between categories of enforcers – national competition authorities as public enforcers, and national courts in private enforcement between individual parties.

NCAs are closely linked with their counterparts and with the European Commission, specifically DG COMP, through the cooperation mechanisms of the European Competition Network (ECN), with its rules for case allocation and consistent application of Community competition law.<sup>3</sup> However, no such mechanism exists for national courts, respecting the principles of judicial independence and procedural autonomy. To fill this potential consistency gap, certain tools have been introduced pursuant to the Modernisation Regulation to promote consistent application of the competition rules by the national courts, and to bridge public and private enforcement of competition law.

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<sup>1</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 04.01.2003, p.1-25, in force 1 May 2004. In particular, the Regulation grants national competition authorities and national courts the power to grant exemptions under Article 81(3) EC, previously the exclusive domain of the European Commission.

<sup>2</sup> For an account of the reforms, see for example C-D Ehlermann ‘The Modernization of EC Antitrust Policy: A Legal and Cultural Revolution’ (2000) 37 *Common Market Law Review*, 537-574; D Gerber ‘Modernising European Competition Law: A Developmental Perspective’ (2001) 22(4) *European Competition Law Review*, 122-130; J Venit ‘Brave New World: The Modernization and Decentralization of Enforcement under Articles 81 and 82 of the EC Treaty’ (2003) 40 *Common Market Law Review*, 545-580; H Kassim & K Wright (2007) ‘Revisiting Modernisation: the European Commission, Policy Change and the Reform of EC Competition Policy’, Centre for Competition Policy working paper 07-19; H Kassim & K Wright ‘Bringing Regulatory Processes Back In: Revisiting the Reform of EU Antitrust and Merger Control’ (2009) special issue of *West European Politics*, D Mabbett & W Schelkle (eds) *Managing Conflicts of Interest in EU Regulatory Processes*, forthcoming

<sup>3</sup> Commission Notice of 27 April 2004 on cooperation within the Network of Competition Authorities, OJ C 101, 27.4.2004, p. 43-53

The competition regime has been institutionally led by administrative agencies pursuing public enforcement of competition law. To date there is still relatively little private enforcement in Europe. The nature of the competition regulation and enforcement system could be described as ‘quasi-judicial’. This quasi-judicial nature encompasses several elements: investigative, decision-making and enforcement functions may be carried out by a single agency; there are different types and configurations of administrative and judicial bodies making and enforcing the law; there are different degrees of persuasive or binding force attached to the rules they apply and make; administrative authorities have taken on more judicial characteristics, in terms of formality, approach to evidence, procedural rights and reporting of decisions.<sup>4</sup> The European Commission itself has been characterised as investigator, prosecutor and judge<sup>5</sup> in its enforcement of competition policy, and at the national level there are different models for public enforcement. In some Member States, courts may be involved in public as well as private enforcement of competition law. We therefore perceive merging, overlapping, or cross-over of the judicial and administrative spheres.

It is this paper’s central thesis that the European Commission and national competition authorities are taking on more ‘court-like’ functions to meet the challenge of potential divergent application of the EC competition rules by national judges following decentralisation. This has broader implications for the interaction between administrative agencies and the judiciary, and their partnership and tensions. In a wider context, new governance tools have somewhat sidelined the traditional command and control role of courts.<sup>6</sup>

The paper proceeds as follows. Section II explores the traditional roles of the judiciary as ultimate interpreters and ‘knowers’ of the law, and guardians of the coherence of the system. Section III narrows the focus to EC competition law, describing the institutional relationships within its post-2004 system of enforcement. It concentrates on the links between bodies

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<sup>4</sup> The latter is a definition of juridification: see for example, L C Blichner and A Molander ‘Mapping Juridification’ (2008) 14(1) *European Law Journal* 36. In the context of competition law, I Maher ‘Juridification, Codification and Sanction in UK Competition Law’ (2000) 63(4) *Modern Law Review* 544-569

<sup>5</sup> See, for example, W Wils, ‘The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis’ (2004) 27(2) *World Competition* 201-224

<sup>6</sup> See J Scott & S Sturm ‘Courts as Catalysts: Re-Thinking the Judicial Role in New Governance’ 13 *Columbia Journal of European Law* (2006-7) 565-594; J Scott & D M Trubek, ‘Mind the Gap: Law and New Approaches to Governance in the European Union’ (2002) 8 *European Law Journal* 1; D M Trubek, P Cottrell & M Nance ‘“Soft Law”, “Hard Law” and EU Integration’ in G De Búrca & J Scott (eds) *Law and New Governance in the EU and the US*, 2006, Portland: Hart, 65-96

representative of the judicial and administrative spheres: national competition authorities and national courts; the European Court of Justice and national competition authorities; and primarily the European Commission and national courts. Section IV exposes two examples where the European Commission and national competition authorities appear to be taking up more 'judicial' functions pursuant to the reforms: (a) interpretative/normative rulings – I argue that the European Commission's opportunity to give an opinion in a national court case, under Article 15 of the Modernisation Regulation, is akin to a soft law preliminary ruling procedure; and (b) precedent-setting – the obligation of a national court, in *Masterfoods*<sup>7</sup> and Article 16 of the Modernisation Regulation, not to go against a contemplated or existing decision of the Commission, which extends further than NCAs' obligations not to counter an existing decision; and the White Paper on damages actions proposal for the binding effect of NCA infringement decisions in courts throughout the Community in follow-on actions. Section V offers a possible explanation for this behaviour, namely the expertise of administrative agencies in competition law enforcement, and in particular the historically central role of the European Commission, as an alternative source of legitimacy to traditional rule of law notions. Section VI concludes, finding that these traditional roles of judges are being assumed by the Commission and NCAs in the pursuit of (and perhaps an unforeseen consequence of) effective application of the EC competition rules.

## II. THE JUDICIAL ROLE

Dicey's doctrine of the rule of law rests on three basic principles: the absolute supremacy of the law over arbitrary power, or discretion; equality before the law; and that the law be defined and enforced by the courts.<sup>8</sup> While differing in their underlying attitudes to the rule of law, Raz, Fuller, Hayek, Rawls<sup>9</sup> all to some degree observe the following characteristics: generality (applicable to all); promulgated and adequately publicised; prospective (no retroactivity); clarity; stability; no rules which are impossible to obey; no contradictory rules; consistent application - all overseen by an independent judiciary.

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<sup>7</sup> Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369

<sup>8</sup> A V Dicey *Introduction to the Study of the Law of the Constitution* (1885) 10th edn, 1959, London: Macmillan, pp 188, 193, 195

<sup>9</sup> L Fuller *The Morality of Law* 1964, New Haven: Yale University Press, 8; J Rawls *A Theory of Justice* 1973, Oxford: OUP; J Raz *The Authority of Law* (1979) Oxford: OUP; F von Hayek *The Road to Serfdom* (1944), 1994, London: Routledge and Paul Kegan

A central component of the judicial role is therefore to ensure coherence in the system. Here we are chiefly concerned with normative adjudicative coherence,<sup>10</sup> that is, with rulings. “When applied to a normative system, coherence is considered a feature, actual or ideal, of that system, and is therefore a systemic notion: a legal system is coherent if its components fit together, either all of them (global systemic coherence) or some of them (...local systemic coherence)” (Bertea 2005, 157). The latter is clearly easier to achieve (Baum Levenbook 1984, 371). In the context of this paper, global coherence would relate to the body of EU law as a whole, and local coherence to EC competition law as a particular branch of law, a subset of EU law. A system is coherent if its parts are logically linked. Coherence is therefore a form of justification: for a decision to be legally justified, it must cohere with established law.<sup>11</sup> As both Bertea and Moral Soriano show, one approach of ECJ judges is “not [to] seek to determine *what the law is* according to the criterion of coherence, but, rather, they try to make the legal system (the existing law and previous decisions) a coherent unit (or whole). By so doing, the legal system becomes workable and effective”<sup>12</sup> [emphasis in original]. Whereas uniformity suggests only one ‘correct answer’ or path, coherence is a matter of degree. As Bertea observes, “...the pluralist nature of the Community sits poorly with the idea of unity” (155). Consistent application of the rules is one element of coherence.<sup>13</sup> The thin distinction between ‘coherent’ and ‘uniform’ application was recently raised in the Advocate General’s opinion in *X BV*, a preliminary reference concerning the admissibility of a European Commission intervention in a national court case, where the Advocate General endorsed the ‘global’ view of coherence as the means of achieving *effective* application of Community law.<sup>14</sup> Here, ‘consistent’ and ‘coherent’ application seem to be used interchangeably in different language versions.

It is also possible to differentiate between theories of coherence in the legal system and theories of coherence in legal reasoning of decisions (Moral Soriano 2003, MacCormick 1979). One means of ensuring consistent application is by arguing by analogy. According to the principle of equal treatment under the rule of law, like cases should be treated alike

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<sup>10</sup> For a discussion of different types of coherence in legal philosophy and their operation in the case law of the ECJ, see S Bertea ‘Looking for Coherence within the European Community’ (2005) 11(2) *European Law Journal* 154-172

<sup>11</sup> B Baum Levenbook ‘The Role of Coherence in Legal Reasoning’ (1984) 3(3) *Law and Philosophy* 355-374

<sup>12</sup> L Moral Soriano ‘A Modest Notion of Coherence in Legal Reasoning. A Model for the European Court of Justice’ (2003) 16(3) *Ratio Juris* 296-323, 298

<sup>13</sup> See N MacCormick *Legal Reasoning and Legal Theory* (1979) Oxford: Clarendon; A Schiavello ‘On “Coherence” and “Law”: An Analysis of Different Models’ (2001) 14(2) *Ratio Juris* 233-43, 236

<sup>14</sup> Case C-429/07 *Inspecteur van de Belastingdienst/P/kantoor P v X BV*, reference OJ C 297, 8.12.2007, p. 23, opinion of Advocate General Mengozzi of 5.3.2009. For a fuller discussion see K Wright ‘European Commission Interventions as *Amicus Curiae* in National Competition Cases: the Preliminary Reference in *X BV*’ (2009) *European Competition Law Review*, forthcoming.

(Rawls 1973) - comparable situations must not be treated differently and different situations must not be treated in the same way, unless objectively justified. This is directly related to precedent. The judge's role is to interpret an individual case within the framework of existing legal decisions and constitutional principles, by following the decisions in cases with similar facts (if necessary distinguishing the current case from earlier ones, expanding or limiting the scope of the earlier decision). In this way the judge both applies precedents from previous cases and creates precedents for the future. In English common law, the doctrine is known as *stare decisis* ('to stand by that which is decided') - precedents are authoritative and binding.<sup>15</sup> Community law does not formally adhere to a doctrine of precedent. However, scholars such as Koopmans<sup>16</sup> and Komarek<sup>17</sup> argue convincingly that in practice it is recognisable in EU law.

The judicial means of securing consistent application of the rules within the Community legal order is the preliminary reference procedure under Article 234 EC. For the purposes of Article 234, only a 'court or tribunal' may address a question to the ECJ. The concept of a 'court or tribunal' is autonomous to Community law. The ECJ's case law of the ECJ sheds light on the elements which define a court: the *Schmid* case test is whether the body is *established by law*, whether it is *permanent*, whether it *applies rules of law*, whether its *jurisdiction is compulsory*, whether its *procedure is inter partes*, and whether it is *independent*.<sup>18</sup>

The *inter partes* criterion, implying that both complainants and respondents should be legally represented and enjoy procedural rights, may be weighed relative to the independence of the body in question.<sup>19</sup> Wils goes as far as to say that "Procedural guarantees for the defendant

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<sup>15</sup> In English law, this is also dependent on the hierarchy of the courts, and the doctrines of *ratio decidendi* (the essential reason for the decision in the case) and *obiter dictum* (opinion of the judge which has incidental bearing on the case) – only the *ratio* is binding. In the magazine *Punch*, Miles Kington offered an alternative definition of judicial precedent: "A trick which has been tried before, successfully." (J A Holland & J Webb, *Learning Legal Rules* 2003, 5<sup>th</sup> edn, Oxford: OUP, p. 130)

<sup>16</sup> T Koopmans 'Stare Decisis in European Law' in D O'Keeffe, H G Schermers (eds) *Essays in European Law and Integration*, Deventer, Kluwer, 1982, 11-27

<sup>17</sup> J Komarek, 'Federal Elements in the Community Judicial System: Building Coherence in the Community Legal Order' (2005) 42(1) *Common Market Law Review* 9-34, at 15-16. A fuller discussion is found in another version of Komarek's paper, 'Creating a Quasi-Federal Judicial System of the European Communities', (2006) Institute for European Law at Stockholm University paper series, No. 54, pp. 32-40

<sup>18</sup> Case C-516/99 *Schmid* [2002] ECR I-4573 at 34

<sup>19</sup> Case C-54/96 *Dorsch Consult Ingenieurgesellschaft v Bundesbaugesellschaft Berlin* [1997] ECR I-4961; Joined cases C-110-147/98 *Gabalfrisa and Others* [2000] ECR I-1577; Case C-17/00 *De Coster v Collège des Bourgmestres et Echevins de Watermael-Boitsfort* [2001] ECR I-9445. However, there was no 'weighing' in the more recent Case C-96/04 *Standesamt Stadt Niebüll* [2006] ECR I-03561

tend to be stronger in public enforcement proceedings than in civil litigation”.<sup>20</sup> The case law on Article 6 of the European Convention on Human Rights is relevant here.

There are also several elements to the compulsory jurisdiction criterion. First, it may imply that the proceedings lead to a final decision of a judicial nature, that is making a legal determination and/or imposing penalties.<sup>21</sup> Secondly, it may signify that the parties have no other forum under law to solve their dispute. Thirdly, it may mean that it is compulsory on the part of the public body to take up the case or take a decision. Courts must decide cases which are brought before them, assuming there are no legal admissibility problems – the ruling made must reflect the remedy sought; whereas administrative agencies may be able to select their cases or decide whether or not to investigate based on resources. This is particularly true for competition authorities.

### ***The judicial role in the context of EC competition law enforcement***

In the context of EC competition law, we can make a distinction between public and private enforcement. The aim of public enforcement is to ensure compliance with the competition regime, selecting optimal cases or investigations to pursue with the ultimate goal of deterrence. As Wils has it, the role of public enforcement should be to clarify and develop antitrust prohibitions, punishing infringements. Private enforcement under EC competition law is based on directly effective rights of individuals.<sup>22</sup> Whereas public enforcement may be able to find and punish an infringement, generally it cannot remedy this by giving compensation or a specific injunction. Importantly, rulings in private litigation only have effects between the parties (but may be cited as precedents in subsequent cases...). This will be discussed in more detail below.

Article 35 of Regulation 1/2003 allows Member States to decide the appropriate institutional structures for public enforcement of competition law. This was partly to recognise the existing situations in the Member States.<sup>23</sup> Three models are identified: (a) an integrated agency, competent to investigate and to take decisions, with potential for judicial review of

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<sup>20</sup> W Wils ‘The Relationship between Public Antitrust Enforcement and Private Actions for Damages’ (2009) 32(1) *World Competition* 3-26, 17

<sup>21</sup> First established in Case 138/80 *Borker* [1980] ECR 1975, para 4

<sup>22</sup> As an aside, the *Crehan* and *Manfredi* judgments, establishing a Community right to an effective remedy for breach of Community competition rules, can be viewed in terms of global coherence of the system, as they echo *Francovich*-style wording: C-453/99 *Courage Ltd v Bernard Crehan*, ECR [2001] I-6297; C-295/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA*, ECR [2006] I-06619.

<sup>23</sup> Commission Staff Working Paper, Commission Proposal for a Council Regulation Implementing Articles 81 and 82 EC, National Courts in public enforcement (Article 36) [now Art 35], SEC (2002) 408, Brussels 11.4.2002, p. 3

the final agency decision before a competent court; (b) split functions, with the investigation carried out by an administrative agency, and the final decision taken by a court, again with the possibility of judicial review of the final decision; and (c) an administrative agency may reach a finding of no infringement, but a court must pronounce a prohibition or impose sanctions, with the possibility of that decision being appealed by a higher court.

In these configurations, courts are involved in a public, as opposed to private, enforcement role, and are viewed as competition authorities for the purposes of the Modernisation Regulation and the Network Notice. In their private enforcement capacity, relations between the national courts and the Commission are covered by certain provisions of the Modernisation Regulation elaborated by the Courts Notice.<sup>24</sup> The Courts Notice applies to ‘those courts and tribunals that can apply Articles 81 and 82 and that are authorised to ask a preliminary question...’ (recital 1), which links with the definition of a court or tribunal in Community law as discussed above. Recital 2 of the same Notice states that where a national court is also designated as a competition authority pursuant to Article 35(1) of the Regulation, cooperation with the Commission is covered both by the Courts notice and the Network Notice. This emphasises the potential duality of the judicial role. Its significance is that Article 11(6) of Regulation 1/2003 provides for the possibility of the Commission opening its own investigation and taking over a case where an NCA is already dealing with the matter, in certain limited circumstances. However, the Commission may not take over while an appeal or review is on-going in a court – “The effects of Article 11(6) do not extend to courts insofar as they are acting as review courts...” (Article 35(3) and Recital 35 of the Regulation). Recital 35 of the Regulation states that where the public enforcement function is split, as in scenarios (b) and (c) described above, and a prosecuting administrative authority brings a case before a separate judicial authority for an infringement decision, prohibition pronouncement or to impose a fine, Article 11(6) only applies to the prosecuting authority.

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



### III. THE INSTITUTIONAL RELATIONSHIPS IN EC COMPETITION LAW ENFORCEMENT

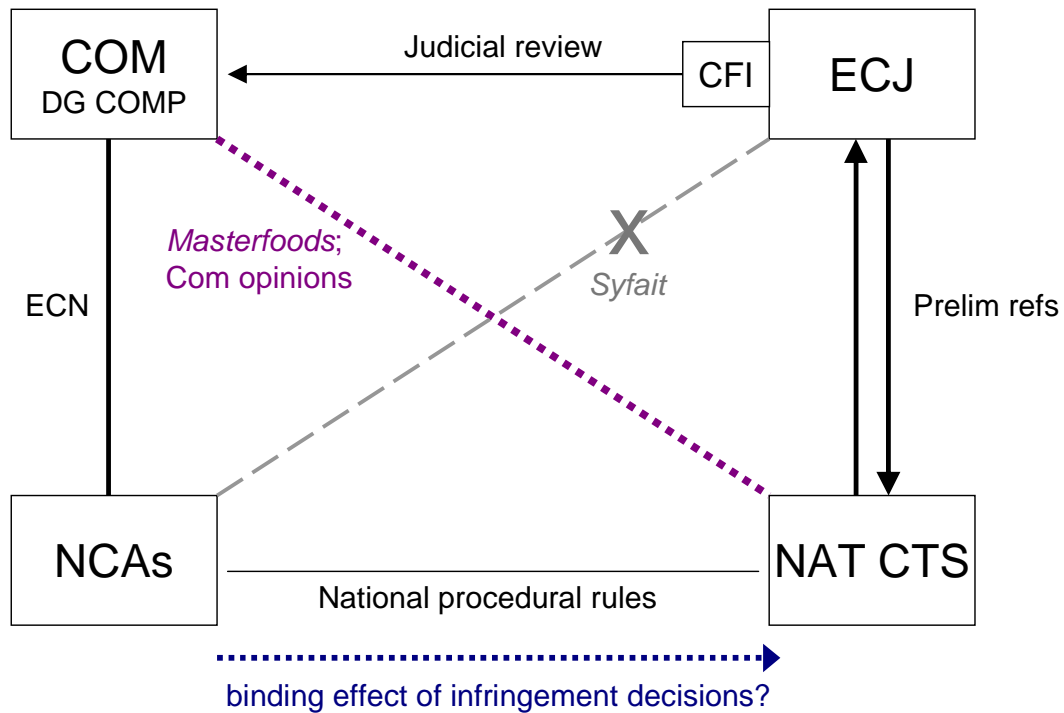


Fig 1. The institutional system of EC competition law enforcement

- FIGURE 1 HERE -

My focus in this paper is those institutional relationships between judicial and administrative bodies where consistent application of the rules as a result of decentralised enforcement comes into play - primarily between the European Commission and national courts, and, secondarily, between national competition authorities and national courts. However, I shall briefly outline all of the institutional links within the system, as represented in Figure 1.

#### Commission-CFI/ECJ

The relationship between the European Commission and the Community Courts is one of judicial review. Under Article 230EC a directly and individually concerned party may apply to the Court of First Instance for annulment of a Commission decision relating to Articles 81 or 82 EC or to Regulation 1/2003. The European Court of Justice only hears cases on points of law on appeal from the CFI. Through judicial review the Community Court imbues the Commission with the values and standards it should use in its decision-making, for example, the standard of proof for finding an infringement, which contributes to systemic coherence.

On appeal, the ECJ's concern may be overall (global) coherence of competition law with EU law in general.

This relationship is affected by decentralisation only insofar as decisions which may have been taken by the Commission, subject to review at the Community level, could now be taken at the national level by an NCA, subject to review in a national court. Atanasiu and Ehlermann argue that this implies a qualitative impact - a higher standard of review and closer scrutiny of Commission decisions.<sup>25</sup> This is a topic for another paper.

### **Commission-NCAs; NCAs among themselves**

As mentioned above, the relationships between the European Commission and NCAs and NCAs amongst themselves are managed within the European Competition Network. A full discussion is beyond the scope of this paper.<sup>26</sup> Briefly, in terms of mechanisms to promote consistent application, according to the principle of parallel application<sup>27</sup> NCAs are obliged to apply Community competition law alongside national competition law where trade between Member States is affected. By virtue of supremacy of EU law, an NCA may not allow a practice which is prohibited by Article 81 or 82. If practice is not prohibited under Article 81, an NCA cannot apply stricter national rules to prohibit it (but it may apply stricter rules in circumstances covered by Article 82) - Article 3 of the Modernisation Regulation, sometimes known as the convergence rule. NCAs cannot contradict or overrule an existing Commission decision (Art 16 Mod Reg). Only the Commission can make a Community-wide finding that Article 81 or 82 is not applicable to a practice, which binds all national competition authorities (Art 10 Mod Reg).

At least 30 days before adopting a decision requiring that a competition infringement be brought to an end, an NCA must notify the Commission, and other NCAs through the ECN, of its envisaged decision (Art 11(4)). In this way consistent application of the rules can be monitored and there is an opportunity to raise the alarm if necessary by making observations before the decision is adopted.

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<sup>25</sup> I Atanasiu & C-D Ehlermann 'The Modernisation of EC Antitrust Law: Consequences for the Future Role and Function of the EC Courts' (2002) 23(2) *European Competition Law Review* 72-80, at 72-3: "...direct applicability of Article 81(3) EC will oblige the European courts to switch from the self-imposed limited control exercised under the current [pre-2004] system to a normal-standard type of judicial review."

<sup>26</sup> see H Kassim & K Wright, 'Network Governance in the European Union: the Case of the European Competition Network' (2009), based on interviews with officials in DG COMP and NCAs, presented in panel 2 I at this conference.

<sup>27</sup> Established by the European Court of Justice in case C-14/68 *Walt Wilhelm v Bundeskartellamt* [1969] ECR I

The Commission retains the power to relieve an NCA of its competence by initiating its own proceedings under Article 11(6), as mentioned above. The Network Notice indicates the circumstances where the Commission would in principle seek to take over a case: where network members envisage conflicting decisions, or where an envisaged decision clearly conflicts with existing case law; where an NCA is “unduly” drawing out proceedings; where a Commission decision is necessary to develop Community competition policy; and where the NCA concerned does not object to this course of action (para 54 Network Notice). In addition, it states that it will give reasons to all members of the network if it does purport to take over a case. Much was made of this provision at the time of the reform, but it has not been used to date.

### **National courts among themselves**

As mentioned above, there are no formal links among national judges in competition law enforcement. There is scope for cooperation through soft fora such as the Association of European Competition Law Judges, but it is not linked to the Commission, and its members meet to exchange best practice rather than to cooperate in specific cases. The Commission does provide funding through calls for proposals for training judges in developments in EC competition law and assessing economic evidence. This horizontal judicial cooperation may need to be strengthened if private enforcement increases significantly.<sup>28</sup> More broadly, the Brussels I Regulation deals with recognition of judgments from other Member States in civil and commercial proceedings.<sup>29</sup>

### **ECJ-national courts**

The link between the ECJ and the national courts, and the primary tool for the consistent interpretation of Community law throughout the Member States, is the preliminary reference procedure. Through the doctrine of direct effect, national courts are also Community courts.<sup>30</sup> The ECJ is not involved in practical day-to-day enforcement of EC competition law, but of

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<sup>28</sup> For a discussion of possible models for judicial cooperation, see F Cengiz & K Wright ‘Strategies for a European Judicial Network from the Perspective of Competition Policy’, UACES Annual Conference ‘Rethinking the European Union’, Edinburgh, 1-3 September 2008

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

<sup>30</sup> A-M. Slaughter, A. Stone Sweet and J.H.H. Weiler (eds), *The European Courts and National Courts: Doctrine and Jurisprudence* 1997, Oxford & Portland: Hart, particularly Karen Alter’s contribution, ‘Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration’.

course is the ultimate interpreter of Articles 81 and 82 and related legislation. Again, this relationship appears not be directly affected by decentralisation after the reforms. Several commentators hypothesised that decentralised enforcement would lead to an increase in preliminary references,<sup>31</sup> but it may still be too early to say whether an increase has materialised.<sup>32</sup> One potential factor in this is the opportunity for national judges to ask the European Commission for an opinion – discussed in Section IV below.

### **Commission-national courts**

Article 6 of the Modernisation Regulation explicitly provides that national courts shall have to power to apply Articles 81 and 82 of the Treaty, in their entirety. Before the reforms, only the Commission was empowered to grant exemptions under Article 81(3), making it difficult for national courts to conclusively rule on a case. If the national judge took the view that individual exemption was possible in the case, s/he was meant to suspend the proceedings until the Commission had made a decision, whilst being free to adopt interim measures in the meantime. Where the Commission closed proceedings by ‘comfort letter’ to the parties rather than by a formal decision, the national court was not formally bound but had to take that letter into account in determining whether the agreement or conduct in question infringed Article 85(now 81).<sup>33</sup> To minimise divergence in the decentralised application of Articles 81 and 82 (and especially exemptions under 81(3)), the convergence rule discussed above in relation to the Commission and NCAs - Article 3 of the Modernisation Regulation - also applies to national courts.

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

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<sup>31</sup> Atanasiu & Ehlermann, n.26 above; K Lenaerts & D Gerard ‘Decentralisation of EC Competition Law Enforcement: Judges in the Frontline’ (2004) 27(3) *World Competition* 313-349

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

<sup>33</sup> Case 99/79, *Lancôme v Etos* (1980) ECR 2511, para 11

Article 15 of Regulation 1/2003, provides for the European Commission's intervention in national court proceedings. Member State courts may ask the European Commission for information or for its opinion on questions concerning the application of the EC competition rules (15(1)). The European Commission and national competition authorities may also make own-initiative written interventions, and oral submissions with the permission of the judge, in legal proceedings between private parties (15(3)). This is discussed more fully below in Section IV.

### **ECJ-NCA**s

As discussed above, 'competition authority' and 'court' are autonomous concepts of Community law. In 2004 the Greek Competition Commission attempted to address a preliminary question to the ECJ in the *SYFAIT* case,<sup>34</sup> concerning a potential abuse of a dominant position under Article 82 EC in the pharmaceuticals sector. However, the ECJ ruled that the question was inadmissible (contrary to the opinion of Advocate General Jacobs) as the NCA was not a 'court or tribunal' according to the *Schmid* elements discussed above: body established by law, permanent, applying rules of law, with compulsory jurisdiction, *inter partes* procedure, independent.

The role of Article 11(6) of Regulation 1/2003 was central to the ECJ's ruling that the question was inadmissible. Under Article 11(6) the Greek NCA may, at least in theory, be relieved of its competence where the European Commission takes over an investigation, implying that proceedings initiated before the NCA will not necessarily culminate in a 'decision of a judicial nature': an element of compulsory jurisdiction. Anagnostaras submits an alternative argument that there was compulsory jurisdiction, in the sense that the investigation was initiated with the objective of reaching a final determination.<sup>35</sup> Also, in practice, the European Commission had not brought Article 11(6) into effect.

The second reason for the inadmissibility ruling was that the Greek Competition Commission lacks the requisite level of independence to be a judicial body, structurally and operationally. It acts as a third party relative to the complainants and respondents before it, but does not act as a third party towards its own secretariat. There are hierarchical links. The ECJ found that

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<sup>34</sup> Case C-53/03 *Syfait v GlaxoSmithKline* [2005] ECR I-4609 concerning possible abuse of a dominant position under Article 82 in the context of parallel trade in pharmaceuticals with state intervention on national pricing levels.

<sup>35</sup> G Anagnostaras 'Preliminary Problems and Jurisdiction Uncertainties: The Admissibility of Questions Referred by Bodies Performing Quasi-Judicial Functions' (2005) 30(6) *European Law Review* 878-890, 890

there were insufficient legal safeguards for individual members on discipline, appointment and dismissal.

A, presumably unintended, consequence of the *SYFAIT* admissibility ruling is that it implies uneven access to the judicial tool of the preliminary reference procedure, dependent on institutional structure. Member States with a dualist competition authority structure, categories (b) and (c) of the typology described in Section II above, are favoured. Proponents of allowing NCAs to address the ECJ cite a judicial economy argument – a question could be resolved at an early stage in the proceedings, before the issue reaches a review court. This would contribute to legal certainty by minimising the institutional divergence between NCAs and national courts. It would also reaffirm the eminence of the ECJ in interpreting EU law.

Those against cite the floodgates argument – the ECJ already has a heavy workload. The mooted creation of a European Competition Court, or a future role of the CFI hearing preliminary references, may negate this effect. A more fundamental objection is that allowing NCAs, regardless of structure, to become involved in the preliminary reference procedure undermines the dialogue between courts. Advocate General Ruiz-Jarabo Colomer used his opinion in *De Coster*<sup>36</sup> to criticise the ‘unsettling effect of the intervention of an administrative body in a dialogue between courts’, brought about by the shifting interpretations of the *inter partes*, independence and ‘decision of a judicial nature’ criteria applied to quasi-judicial bodies in the ECJ’s case law: “Article 234 introduces an instrument for judicial cooperation, a technical dialogue by courts and between courts...The objective of the preliminary ruling procedure is not, therefore, to assist an agency of the executive.” (para 76)

### **NCAs-national courts**

The discussion above has already touched on the different institutional enforcement structures chosen by Member States. In some Member States the competition authority carries out the investigation but the final determination on whether there is an infringement of competition law is taken by a designated court. In some countries the NCA may make the determination of an infringement but consequent penalties must be imposed by the designated court. In this context, the court has a public, as opposed to private, enforcement role. Beyond this potential public enforcement role, certain courts in all Member State jurisdictions have an appeal or

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<sup>36</sup> The quasi-judicial body in this case was the Judicial Board of the Brussels-Capital region, hearing an appeal on a tax on satellite dishes, which the complainant alleged was contrary to the freedom to receive television services from other Member States.

review role towards NCAs (the domestic equivalent of the Commission-CFI/ECJ relationship).

The relationship between NCAs and national courts acting as private enforcers within their own domestic jurisdiction is clearly governed by national procedural rules, subject to the principles of effectiveness and equivalence. However, at EC level Article 15 of Regulation 1/2003 confers on NCAs, as well as the Commission, the possibility to intervene in their domestic jurisdiction in court cases between private parties as *amicus curiae* on issues relating to the application of Article 81 or Article 82 of the Treaty. National rules must therefore not obstruct this possibility. The 2004 Ashurst comparative report found that “All Member States at least recognise that statements/decisions by a national competition authority, a national court or an authority from another EU Member State can be submitted as evidence in damages proceedings although most do not consider them as binding.”<sup>37</sup> Some Member States allow for the binding effect of decisions of their domestic NCAs. In the UK, a claim may only be brought before the Competition Appeal Tribunal (CAT) when the Office of Fair Trading, a UK sectoral regulator or the European Commission has made a decision establishing that a competition prohibition has been infringed, and any appeal of that decision has been finally determined (section 47A of the Competition Act 1998). Section 58A of the Act makes findings of infringement by regulators and the CAT binding on civil courts, again once appeals have been exhausted. To take a further example, in Hungary any statement on the existence or absence of an infringement made in a decision of the Hungarian Competition Authority shall be binding on a court hearing a related lawsuit (Article 88B of the Hungarian Competition Act). The only Member State currently to allow the binding effect of *foreign* NCA decisions is Germany under section 33(4) of the Act against Restraints of Competition. However, there are proposals at the European level to extend this binding effect of NCA decisions to national courts throughout the Community. The implications of this proposal are discussed in the following section.

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<sup>37</sup> ‘Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules, 31 August 2004, available at [http://ec.europa.eu/comm/competition/antitrust/actionsdamages/comparative\\_report\\_clean\\_en.pdf](http://ec.europa.eu/comm/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf), p.69

#### IV. ASSUMING JUDICIAL/COURT-LIKE FUNCTIONS?

This section elucidates two examples where the Commission and competition authorities appear to be assuming more ‘judicial’ functions, both of which serve to provide coherence in the legal system and consistent application of the EC competition rules: (a) normative/interpretative rulings, and (b) precedent-setting.

##### A. Normative/Interpretative Rulings

As discussed above, a central role of judges is to ‘know’ and interpret the law. The ECJ is the ultimate interpreter of Community law. The principal tool through which this role finds expression is the preliminary reference procedure, which safeguards the coherence and consistent (uniform?) interpretation of Community law.

##### *European Commission opinions to national courts in competition cases: soft ‘preliminary rulings’?*

While the ECJ is the ultimate interpreter of EU law, the Commission, specifically DG COMP, is the primary competition enforcer in the Community. The preliminary reference procedure was previously the only institutional link between the national court and the EU institutions. In the 2004 reforms, we observe a parallel strengthening of links between national courts and the Commission.

Article 15 of Regulation 1/2003 provides that EU Member State courts may ask the European Commission for information or for its *opinion on questions concerning the application of the EC competition rules* (15(1)). The European Commission and national competition authorities may also make *amicus curiae* own-initiative written interventions, and oral submissions with the permission of the judge, in legal proceedings between private parties (15(3)). I argue that the Commission opinion to a national court in a competition case appears to be a *sui generis* instrument in Community law, akin to a ‘soft’ preliminary reference procedure.<sup>38</sup>

In view of the principle of judicial independence, it may be remarkable that a judge would seek an opinion from the European Commission as a (supranational) administrative body. In this respect opinions and *amicus curiae* interventions can be distinguished – it might be expected that judges would be more responsive to the former where they themselves take the initiative in requesting assistance. (Indeed, the mechanism is couched in terms of assistance to the national court, rather than the Commission exercising its power to issue an opinion as a

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<sup>38</sup> This section draws on K Wright, ‘European Commission Opinions to National Courts in Antitrust Cases: Consistent Application and the Judicial-Administrative Relationship’ (2008) ESRC Centre for Competition Policy working paper 08-24



Community legal instrument under Article 211 EC.) This is especially true given that judges can find existing guidance in case law, Commission regulations, decisions, notices, and guidelines, while still safeguarding their independence. Nevertheless, how the Commission's interpretation of the law is treated by the national judge, and consequently its legal effect, is relevant to both Article 15 tools. On the evidence of the opinions so far (Wright 2008), 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. That provision for information and opinion requests 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, which suggests it is sensitive to the possibility of legal consequences arising.

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. Due to its formally non-binding nature (as affirmed in the Courts Notice, para 19), the Commission's guidance may cover economic and factual questions in addition to legal ones, and in that sense has a broader scope than a preliminary ruling. However, in some cases it does go further and opines on points of law: in the Lithuanian case it commented on standard of proof, and it indicated Belgian domestic competition law provisions in *SABAM*. In the Lithuanian *UAB Tew Baltija* case the Vilnius District Court sought the Commission's view on 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. As well as pointing to its existing notices and sectoral decisional practice, perhaps more controversially the Commission commented on the standard of proof needed to establish abuse of a dominant position, stating that abuse by the successful concession-holder would have to be 'inevitable or at least the likely result of tender conditions'<sup>39</sup> [emphasis added]. This appears to stray onto the territory of judicial deliberation.

In the Belgian *SABAM* case,<sup>40</sup> the question was whether a collecting society's criteria for granting the status of *grand organisateur* to certain commercial users, entitling them to a

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<sup>39</sup> European Commission Annual Report on Competition Policy 2005, SEC(2006)761 final, 15.6.2006, 77. Available at [http://ec.europa.eu/comm/competition/annual\\_reports/2005/en.pdf](http://ec.europa.eu/comm/competition/annual_reports/2005/en.pdf) (accessed 23.2.2009)

<sup>40</sup> 2004-MR-7 *SABAM* contre « Productions et Marketing », 2005/7059, Brussels Court of Appeal, 3 November 2005

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 rather unusual 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, making its advice more likely to be accepted.

The way in which the request to the Commission is suggested to be drafted also bears striking similarity with requests to the ECJ. DG COMP has posted guidance on its website<sup>41</sup> stating that the request should be limited to ten pages, and should state the subject matter of the case, findings of fact the court has already made, reasons prompting the court's request for assistance, a summary of the parties' arguments, and the questions themselves in a separate section. This guidance, at several points its exact wording, is clearly modelled on the ECJ's own information note on references for a preliminary ruling.<sup>42</sup> This action was taken apparently in response to some judges who were simply sending all the pleadings in the case and asking the Commission to make a determination (for example, in the Spanish petrol cases).<sup>43</sup> This would suggest that in some Member States at least, there are few concerns about the Commission being too interventionist.

In the Spanish courts there have been a number of cases on the validity of supply contracts between petrol station operators and oil companies. Two opinions sought reflect this, perhaps used as test cases. Interestingly, they were also the subject of parallel preliminary references to the ECJ. An obvious advantage of consulting the Commission rather than the ECJ is a practical issue of time constraints – whereas the indicative deadline for provision of an opinion is four months, a preliminary ruling can take at least a year. A shorter stay of proceedings is much less disruptive to the case. For example, the Spanish Supreme Court referred preliminary questions in the context of the petrol station cases in March 2005, on resale price maintenance in exclusive fuel purchasing agreements, and agency contracts between service station operators and oil companies, in particular whether petrol stations

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<sup>41</sup> <http://ec.europa.eu/competition/court/requests.html> (accessed 13.2.2009)

<sup>42</sup> Information note on references from national courts for a preliminary ruling, OJ 2005 C 143/01, 11.6.2005, paragraphs 22-24

<sup>43</sup> E. Gippini Fournier, 'The Modernisation of European Competition Law: First Experiences with Regulation 1/2003' Community Report to the FIDE Congress 2008, 375-483, 486

should be regarded as resellers or agents.<sup>44</sup> The 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.

To the author's knowledge, the Commission has used the *amicus curiae* instrument under Article 15(3) only twice so far. It presented oral as well as written observations to the Paris Court of Appeal 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*.<sup>45</sup> The four-page interlocutory ruling of the Paris Court 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.<sup>46</sup> 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 Competition suggests, the Commission's goal could also have been to *encourage* a preliminary reference to the ECJ for a formally binding ruling.<sup>47</sup>

The second case, *X BV v Inspecteur Belastingdienst*,<sup>48</sup> is pending in Amsterdam Court of Appeal while an ECJ preliminary ruling on the admissibility of the Commission's intervention is sought. The question is whether the Commission can intervene on the basis of Article 15(3) strictly only where a national court is directly applying Article 81 or 82, or to secure the effectiveness of the competition rules more generally. *X BV* is ostensibly a tax case, but the firm was seeking tax deductibility of profit from a Commission fine imposed for its involvement in the plasterboard cartel. The Advocate General's opinion was favourable to the Commission's intervention, narrowing the issue to whether the Commission may intervene

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<sup>44</sup> Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA* [2007] 4 CMLR 5. The court stipulated that a resale price maintenance clause was not covered by block exemption.

<sup>45</sup> Case 05/17909, Paris Court of Appeal judgment, 7.6.2007

<sup>46</sup> See case notes by J Philippe and F Kramer in *e-Competitions*, October 2007-II; and N Lenoir, D Roskis and Ch M Doremus in *e-Competitions* December 2007-I for a fuller discussion of the case

<sup>47</sup> Annual Report on Competition Policy 2006 Commission Staff Working Document, SEC (2007) 860, 25.7.2007, 90. Available at [http://ec.europa.eu/competition/annual\\_reports/2006/part2\\_en.pdf](http://ec.europa.eu/competition/annual_reports/2006/part2_en.pdf) (accessed 23.2.2009)

<sup>48</sup> Case C-429/07 in the ECJ; Case 06/00252, LJN BB3356 in Amsterdam Court of Appeal; first instance in Haarlem District Court, Case AWB 05/1452, LJN AX71122, 2.5.2006. See K Wright 'European Commission Interventions as *Amicus Curiae* in National Competition Cases: the Preliminary Reference in *X BV*' (2009) *European Competition Law Review*, forthcoming.

under Article 15(3) where it wishes to ensure the coherent application of the effects of one of its *own* decisions.

Although the Commission originally announced its intention to publish its opinions on its website, to date it has not done so. Up until the middle of 2008, apparently 19 opinions had been delivered (Gippini Fournier 2008), but the author has only managed to find trace of 11, with varying degrees of detail. They have not been published in the Official Journal, as Community instruments are required to be under the Rules of the Procedure of the Commission.<sup>49</sup> The fact that an act is published or notified – or promulgated, according to the bases of the rule of law – may be indicative of an intention that it should have binding force.

The question arises whether opinions to national courts under the Modernisation Regulation are really opinions as understood by Article 249EC. Beyond its notice on cooperation with national courts in the State aid field,<sup>50</sup> the author is aware of no other policy area where the Commission offers an opinion in national judicial proceedings. The opinion to a national court appears to be a *sui generis* instrument. If we categorise Community soft law instruments according to their function – preparatory and informative; interpretative and decisional; and steering instruments<sup>51</sup> – Commission opinions fit most comfortably into the second category. The Commission adopts interpretative notices and communications giving the Commission's opinion on how Community law should be interpreted, often summarising the European courts' case law. In this way, it has a 'post-law' function (Senden 2005, 82). Commission opinions to courts in this competition law context correspond more closely to a declaration or communication. However, it still does not correspond easily with the definition of a soft law instrument establishing 'rules of conduct' in Snyder's and Senden's formulations.<sup>52</sup>

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<sup>49</sup> Rules of Procedure of the Commission, C (2000) 3614, OJ 2000 L 308, 8.12.2000, 26. Articles 17 [Secretary General] and 18 [Authentication of Commission instruments]: The Secretary General must ensure that all Community instruments mentioned in Article 249 EC are notified to those concerned and published in the Official Journal.

<sup>50</sup> Commission Notice on cooperation between national courts and the Commission in the State Aid field, O J C 312, 23.11.1995, 8. A new draft notice on State aid enforcement by national courts was published for consultation on 22 September 2008, available at [http://ec.europa.eu/competition/state\\_aid/reform/enforcement\\_draft\\_en.pdf](http://ec.europa.eu/competition/state_aid/reform/enforcement_draft_en.pdf) (accessed 23.2.2009) – see Part 3 of the draft.

<sup>51</sup> L. Senden, 'Soft law and its Implications for Institutional Balance in the EC' (2005) 1(2) *Utrecht Law Review* 79-99, 81

<sup>52</sup> L. Senden, *Soft Law in European Community Law* 2004, Portland: Hart, 112: 'rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effect, and that are aimed at and may produce practical effects.'; developed from F. Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' (1993) 56(1) *Modern Law Review* 19-54, 32: 'rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects.'

To what extent might Commission opinions become binding? Commission instruments and guidance carry varying degrees of persuasive force. As Snyder suggests, a soft law act can become binding if one of the parties in private litigation invokes it (33). Commission opinions could also become binding indirectly through the national court's judgment, particularly if the national court's judgment essentially transposes the Commission's advice. This may be likely, for instance, where the judge is less experienced in competition law or at judging economic evidence, where the court is more willing to apply an interpretation 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. In addition, the national judge could use the opinion for interpretation of other, either national or EU, obligations or instruments. Whereas the judgment would be effective between the parties, a more universal effect could result if a principle expressed in a Commission opinion is then used in subsequent cases in the national case law. Aside from the strictly normative effect, the practical impact of this may depend on the extent to which such opinions only summarise existing law, or become more novel and interventionist.

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. If the Commission were to publish its opinions, it would strengthen their universal effect, which is desirable if the aim is to promote consistent application of the rules across Member States. It would also lend greater transparency and legitimacy if the Commission is stepping onto judicial territory. It is submitted that any intervention having an effect on application of the law should be undertaken in an open and transparent way to counter the perception that the Commission can influence national judgments 'by the back door', particularly where it opines on points of law.

While in *SYFAIT* the ECJ refused to answer the Greek Competition Commission's question, partly as a result of its membership of the ECN, guarding the preliminary reference procedure as an exclusive club for a dialogue between courts, the Commission is coming over to the ECJ's territory with its opinions and *amicus curiae* interventions.

## **B. Precedent-Setting**

This is the second area in which the Commission and national competition authorities may be taking on a traditionally judicial role. I have discussed in the preceding section how a Commission opinion may become indirectly binding through national court judgements which may directly transpose the advice. A further related aspect of the judicial role is applying and creating precedent, that is interpreting an individual case within the framework of existing legal decisions and Community law principles, in turn also laying down a decision to be followed in the future, as discussed in section II above. In EC competition law (as in many other areas) we observe ‘precedents’, in the everyday meaning of the word, in administrative decision-making. In terms of *applying* precedent, that is following its *own* decisions which it has taken in the past, it is logical and efficient for an agency to rely on experience distilled through its existing decisions, without ‘reinventing the wheel’ with every case. Precedent-*setting* for the future also sends message to firms, contributing to the deterrence objective of the public enforcement role. However, I argue that now we may also be seeing precedent-setting in the narrow legal sense affecting private enforcement. I argue that in a novel and potentially far-reaching development, the binding, or at least persuasive, force of precedent is now being exerted *on courts themselves*.

### **1. Commission precedent-setting**

As already discussed above, by virtue of *Masterfoods* and Article 16 of the Modernisation Regulation, where a national court rules on an agreement, decision or practice under Article 81 or 82EC which is already the subject of a European Commission decision, it cannot take decisions running counter to that decision. If the Commission is contemplating a decision, the national court has a duty to avoid adopting a decision that would conflict with it.<sup>53</sup> This obligation extends further than an NCA’s duty not to counter an existing decision - this could be evidence of a public over private enforcement hierarchy, or it may simply reflect the reality of more structured cooperation between the Commission and NCAs within the ECN.

If the national court doubts the legality of the Commission’s decision, it cannot avoid the binding effects of that decision without a ruling to the contrary by the ECJ, according to *Foto Frost*<sup>54</sup> (Courts Notice recital 13). Only where the national court cannot reasonably doubt the Commission’s contemplated decision, or where the Commission has already decided on a

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<sup>53</sup> See A P Komninos, ‘Effect of Commission decisions on private antitrust litigation: Setting the story straight’ (2007) 44 *Common Market Law Review* 1387 for discussion of the impact of a Commission decision on national proceedings in various scenarios.

<sup>54</sup> Case C-3 14/85 [1987] ECR 4199

*similar* case, may the national court decide on the case pending before it without asking the Commission for information or awaiting its decision (Courts Notice recital 12). This chimes with the doctrine of precedent, where the judge interprets the case in line with existing law by following the decisions in cases with similar facts. It implies that Commission decisions may not only be binding on national courts in the same case with the same parties, but binding in other cases too.

According to Advocate General Cosmas in *Masterfoods*, there is no conflict between a judgment of the national court and a decision of the European Commission where the proceedings are not ‘completely identical’ (para 16). In the English case of *Inntrepreneur v Crehan*,<sup>55</sup> concerning beer tie arrangements between a brewery and a pub leaseholder, the House of Lords interpreted the Advocate General’s statement as meaning that there was a requirement to accept the factual basis of a decision reached by a Community institution only when the *specific* agreement, decision or practice before the national court has also been the subject of a Commission decision, involving the *same parties*. Perhaps more problematically, in *Masterfoods* the Advocate General also said that a conflict only arises ‘when the binding authority which the decision of the national court will have conflicts with the grounds and operative part of the Commission’s decision.’ It is arguable that that ‘grounds’ of the decision could encompass findings of fact open to reconsideration by the national judge. In *Crehan*, Lord Hoffman suggested that ‘the decision of the Commission is *simply evidence* properly admissible before the English court which, given the expertise of the Commission, may well be regarded by that court as highly persuasive’ (para 69) [emphasis added].

## ***2. White Paper proposal for binding effect of NCA infringement decision based on EC rules***<sup>56</sup>

While it contributes to the consistent interpretation of Community law in the decentralised enforcement system, the *Masterfoods* rule also implies that when the European Commission finds a breach of the competition rules, victims of that infringement can directly rely on the Commission's decision as binding proof in civil proceedings for damages. A proposal in the European Commission’s White Paper on damages actions for breach of EC antitrust rules<sup>57</sup> goes beyond the existing *acquis communautaire* by suggesting the binding effect of Member State competition authority decisions on national courts throughout the Community.

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<sup>55</sup> *Inntrepreneur Pub Company and Others v Crehan* [2006] UKHL 38

<sup>56</sup> This section draws on K Wright ‘Binding the Judicial with the Administrative: Some Aspects of the European Commission’s White Paper on Damages Actions for Breach of EC Antitrust Rules’ (2008) *European Current Law monthly digest*, November 2008, xi-xv

<sup>57</sup> COM(2008) 165, 2.4.2008

The Commission proposes that when national courts, in actions for damages, rule on conduct under Article 81 or Article 82 EC which is already the subject of a final decision finding an infringement of those Articles by an NCA within the ECN, they cannot take decisions running counter to that NCA decision. This rule would put NCA decisions on a par with those of the Commission, with some limitations. First, it would apply only to proceedings involving the same infringers and same practices (clarifying the *Crehan* situation above). Secondly, only final decisions would be binding, implying that all appeals would have to be exhausted and time limits expired. Thirdly, it is without prejudice to the national court's right, or obligation in the case of highest courts, to seek clarification on the interpretation of Article 81 or 82 EC by preliminary reference to the ECJ.

The rationales are to promote legal certainty and consistent application of EC competition rules; to avoid re-litigation of issues, boosting judicial economy; and to alleviate the burden of proof on the complainant in bringing a damages action, to encourage greater private enforcement throughout the Community to complement public enforcement by competition authorities. The rule would mean that where a national competition authority finds an infringement of the EC antitrust rules, a complainant would be able to rely on that finding as irrefutable proof, not just as a presumption, when bringing a damages claim based on that breach in a national court in any Member State, without the necessity for further proof. The national court would not be permitted to reinvestigate the facts which led to the finding of infringement.

Although it is not specifically stated in the White Paper, the rule could indirectly bring national courts into the European Competition Network; but arguably leaving the competition authorities in primary position. National judges could still contribute to the development of EC competition law - the burden of proving causal link, effects of the infringement and quantum of the damages should remain with the complainant for determination by the court<sup>58</sup> - but in a more limited way

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<sup>58</sup> According to the proposal, binding effect would apply only in follow-on cases - it would not extend to stand-alone cases, where a plaintiff brings a case directly to court without an existing NCA investigation and attempts to prove the infringement himself. It also only affects actions for damages, not applications for other relief such as injunctions. Where an NCA makes a finding of no infringement, perhaps due to insufficient evidence, that determination would not be binding on the courts. There would be no binding effect for decisions based exclusively on national antitrust rules. Only the finding of infringement itself should be binding, not findings on the effects of the infringement.



One view is that making NCA decisions binding on national judges would create a false hierarchy of public over private enforcement, and create a worrying model for administrative decisions over judicial rulings, threatening judicial independence.<sup>59</sup> The Commission plays down these concerns arguing that in practice, the requirement that the NCA decision should be final before its binding effect applies means that it would have been upheld by an appeal or review court. It would often, although not always, be a judgment confirming the NCA decision that binds the judge hearing the civil case on damages claims. This argument is obviously less strong if the decision was not appealed.

The obligation not to take a decision running counter to one by the Commission applies by virtue of supremacy of Community law, with the decision under the ultimate control of the European Court of Justice – the relationship is not one of deference of the national court to the Commission (Komninos 2006). However, there is a weaker basis for the binding effect of a foreign NCA decision in the national courts of the other Member States. An analogy can be drawn with the Brussels Regulation on the recognition of civil and commercial judgments.<sup>60</sup> Under that Regulation (article 34(1)), a national court may exceptionally refuse recognition of a judgment of another Member State on grounds of public policy, in particular where fair legal process may have been impeded.<sup>61</sup> It is submitted that the conditions for recognising the binding effect of the decision of an administrative body should not be less strict than recognition of another court's judgment.

The legal principle of *res judicata* precludes relitigation of the same issue between the same parties where there has been a final judgment no longer subject to appeal. Identicalness of all parties to the NCA and court proceedings could not be required for the binding effect of an NCA decision to take hold, however, because the claimants in the civil proceedings may not necessarily have been party to the investigation and proceedings before the NCA. This lends weight to the argument that a decision may create a binding precedent beyond a specific case (see *Crehan* above). The situation could become complicated where there are multiple plaintiffs and defendants, especially if they are spread across the EU. Section 33(4) of the German Act against Restraints of Competition, upon which the White Paper proposal is modelled, does not limit binding effect of administrative decisions to claims against parties addressed by the decision; but there is anecdotal evidence that German judges may be

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<sup>59</sup> See, for example, A P Komninos 'Public and Private Antitrust Enforcement in Europe: Complement? Overlap?' (2006) 3(1) *Competition Law Review* 5-26, at 26

<sup>60</sup> Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001, L 12/1

<sup>61</sup> C-7/98 *Krombach* [2000] ECR I-1935, para 21

interpreting the provision narrowly to limit binding effect to decisions where the defendants have had the right to be heard.<sup>62</sup>

A perhaps unintended consequence of the proposal is an asymmetry between the effects of decisions of administrative bodies and those of civil court judgments. Clearly the current proposal for binding effect was not foreseen at the time of the Modernisation Regulation. In the Commission's explanatory memorandum for the proposal which became Regulation 1/2003, it stated that "Decisions adopted by national competition authorities do not have legal effects outside the territory of their Member State, nor do they bind the Commission".<sup>63</sup> The European Competition Network is based on a system of parallel competences, where each network member retains full discretion in deciding whether or not to investigate (Network Notice, para 5). Under Article 13 of the Modernisation Regulation, the fact that another NCA is investigating is sufficient grounds to suspend proceedings or to reject a complaint. However, it has "no obligation to do so" (Network Notice, para 22). If other NCAs are not formally bound by each other's decisions, there is an asymmetry if national judges are to be bound by the decisions of foreign NCAs. In addition, as mentioned above, the majority of Member States do not provide for their national courts being bound by decisions of their own NCAs. It would be rather strange if national courts were bound by decisions of foreign NCAs, but not their domestic counterparts.

### ***3. Different legal effects of NCA and court judgments?***

The asymmetric legal effects of national court judgments and NCA decisions also arise in the context of the duty to disapply national law which is incompatible with EC law. *Simmenthal*<sup>64</sup> affirmed that, in following the principle of supremacy of EC law, conflicting national law which is in force must be automatically inapplicable. Therefore, when a national court is called upon to apply provisions of Community law it must give full effect to Community provisions, if necessary refusing to apply any conflicting provisions of national law. In the preliminary ruling in *Conorzio Industrie Fiammiferi*,<sup>65</sup> the ECJ confirmed the duty of an NCA to disapply legislation which is incompatible with EC competition rules. As Kaczorowska argues, this means that a declaration of incompatibility adopted by a NCA produces universal (*erga omnes*) effects as all national courts and administrative authorities

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<sup>62</sup> W Wurmnest 'A New Era for Private Antitrust Litigation in Germany? A Critical Appraisal of the Modernized Law against Restraints of Competition' (2005) 6(8) *German Law Journal*, 1 August 2005

<sup>63</sup> COM (2000) 582 final, p. 17

<sup>64</sup> Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629

<sup>65</sup> Case C-198/01 *Conorzio Industrie Fiammiferi v Autorita Garante della Concorrenza e del Mercato* [2003] ECR I-8055

considering the national legislation which is not in line with EC competition rules must disapply it. “The effect of a declaration of incompatibility is not limited to the parties investigated by a NCA”.<sup>66</sup> However, it is not clear what the cross-border effect is – is this just within the Member State, or beyond? In light of the White Paper proposal for binding effect of NCA infringement decisions, the legal effects of the declaration would be Community-wide.

The result appears to be that a national court judgment is binding only inter partes, whereas an ‘administrative declaration’ by an NCA may have legal effect throughout the Community. In that sense an administrative declaration may be ‘more’ binding than a court judgment. Despite this, Kaczorowska submits that “...the weight of authority attributable to a mere ‘declaration’ is not yet clear and indeed, it may be that in due course it would be the case that declarations achieve different levels of legal effect in different Member States.”(595)

## **V. EXPERTISE AS LEGITIMACY IN COMPETITION LAW ENFORCEMENT**

The foregoing discussion suggests a complex structure of the ‘judicial’ and the ‘administrative’ after the 2004 competition reforms. Administrative competition authorities, principally DG COMP, appear to be assuming (‘usurping’ may be too strong) traditionally judicial roles. This apparent trend has consequences for the rule of law as upheld by courts. However, it may be unsurprising if we take into account alternative forms of legitimacy and new governance.

Morgan and Yeung synthesise different bases for legitimacy moving beyond its traditional legal notions.<sup>67</sup> In *Rules and Government* (1995), Robert Baldwin’s five measures of regulatory legitimation: legislative mandate, accountability (to democratic institutions), due process (based on fair and open procedures), *expertise* (objective), efficiency (system and/or produced results are efficient – effectiveness, to the aims, and economically efficient). Majone discusses the use of economic expertise by independent regulatory agencies as way of promoting non-majoritarian democracy.<sup>68</sup>

DG COMP had a long-standing monopoly over competition enforcement, and in recent decades certain NCAs have also built up considerable expertise. What we may be observing is

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<sup>66</sup> A Kaczorowska ‘The Power of a National Competition Authority to Disapply National Law Incompatible with EC Law – and its Practical Consequences’ (2004) 25(9) *European Competition Law Review* 591-599, 598

<sup>67</sup> B Morgan & K Yeung, *An Introduction to Law and Regulation*, 2007, Cambridge: CUP

<sup>68</sup> G Majone, ‘Regulatory Legitimacy’ in G Majone (ed) *Regulating Europe*, 1996, Routledge

the primacy of administrative authorities by virtue of their expertise in competition policy and enforcement. The burgeoning role of economic analysis in competition enforcement may also militate against judges' traditional roles. During the reform process concerns were raised that national judges may not have the ability to assess economic analysis and evidence.<sup>69</sup>

In the opposite direction, Maher notes that courts and other quasi-judicial bodies no longer simply apply clearly promulgated rules - one of the bases for the rule of law - but are also required to apply standards that are often open-ended. In addition, judicial or quasi-judicial reasoning has become more purposive or policy-oriented. She observes that this sort of reasoning is a feature of administrative decisions.<sup>70</sup> In addition, courts appear to be more closely scrutinising the decision-making of competition authorities in the context of judicial review. At the Community level, this phenomenon has been widely discussed since the critical 2002 CFI rulings in *Airtours*, *Schneider* and *Tetra Laval* (merger cases – but the same review standard is applied to Article 81 and 82 cases). While the Commission has a margin of appreciation where it carries out complex economic assessments, this margin seems to be narrowing in the case law. One explanation for this may be the perceived increasing technical expertise of the courts themselves. This is a topic for another paper. Suffice it to say that the judicial and administrative spheres seem to be crossing over. The judicial review function is a means of enforcing coherence in administrative decision-making.

## VI. CONCLUSIONS

Decentralisation of enforcement of Articles 81 and 82 EC under the 2004 Modernisation Regulation has led to an increase in the powers and jurisdiction of NCAs and national courts, carrying with it potentially greater risks of divergent application of EC antitrust rules. While NCAs are closely linked with their counterparts and with the European Commission, specifically DG COMP through the cooperation mechanisms of the European Competition Network, no such mechanism exists for national courts. Certain tools have been introduced pursuant to the Modernisation Regulation to promote Community-wide consistent application of the competition rules among national judges in the era of decentralised enforcement, and to bridge public and private enforcement of competition law.

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<sup>69</sup> Interestingly, a reciprocal sentiment was expressed in the context of allowing administrative agencies access to the preliminary reference procedure. In *De Coster*, the Advocate General “the members of administrative organisations which apply legal rules and take decisions in accordance with legal criteria, do not need to be lawyers. This may mean that the question referred will not be worded in the most appropriate way or that it will lack accuracy or the necessary technical precision.” (para 77)

<sup>70</sup> ‘Functional and Normative Delegation to Non-Majoritarian Institutions: the Case of the European Competition Network’ (2007) *conference paper?*, 15, discussing R Unger *Law in Modern Society* 1976, New York: Free Press, at 194

This paper has approached this less explored dimension of the reforms, exploring some side effects of the methods chosen to fill this potential consistency gap. It has discussed the merging of judicial and administrative spheres in the quasi-judicial system of competition enforcement.

One, perhaps unintended, consequence of the tools chosen in pursuit of *consistent* and *effective* enforcement is that the European Commission, and national competition authorities as a result of the EC level reforms, appear to be assuming more traditionally judicial functions.

The paper has considered two examples where this tendency is in evidence. One traditional role of the judiciary is ultimate interpreter and ‘knower’ of the law, constructing and enforcing norms. In the domain of interpretative/normative rulings I argue that the European Commission’s opportunity to give an opinion in a national court case, under Article 15 of the Modernisation Regulation, is akin to a soft law preliminary ruling procedure. The preliminary reference procedure is a dialogue between courts. In the case of its opinions to national courts, we find that the Commission, as primary enforcer of competition law in the Community, is able to complement the formal judicial link of the preliminary reference procedure with a parallel strengthening of its own relations with the national courts. Its opinions may be desirable as a means of achieving consistent application of the rules; but it is submitted that any intervention should be done in an open and transparent way, for example by publishing opinions, to counter the perception that the Commission can influence national judgments ‘by the back door’, particularly where it opines on points of law. While in *SYFAIT* the ECJ refused to answer the Greek Competition Commission’s question, partly as a result of its membership of the ECN, guarding the preliminary reference procedure as an exclusive club for a dialogue between courts, the Commission is coming over to the ECJ’s territory with its opinions and *amicus curiae* interventions.

A connected means of achieving coherence is through applying and creating precedent. We see this in the obligation of a national court not to go against a contemplated or existing decision of the Commission, which extends further than NCAs’ obligations; and in the White Paper on damages actions proposal for the binding effect of NCA infringement decisions in courts throughout the Community in follow-on actions. This binding, or at least persuasive, force of precedent is now being exerted *on courts themselves* by administrative agencies.

We do not know how great the likelihood and risks of divergence really are, so we have no counterfactual. It is very difficult to monitor every national court judgment which touches, directly or indirectly, on the EC competition rules. Article 15(2) of Regulation 1/2003 requires Member States to copy judgments to the Commission,<sup>71</sup> but there is no duty on the courts themselves. If it is accepted that the Commission and NCAs are taking on these more judicial roles, how necessary is that, and do the costs outweigh the benefits?

These developments may have broader implications for the interaction between administrative agencies and the judiciary. In a wider context, new governance tools have somewhat sidelined the traditional command and control role of courts. The expertise of administrative agencies in competition law enforcement, and in particular the historically central role of the European Commission, may be offered as an alternative source of legitimacy to traditional legal notions.

A complementary judicial-administrative relationship is important for the overall success of the EC competition enforcement regime. In the absence of a formal judicial network, the tools included in the reforms may have as their primary goal consistent and effective enforcement of the rules. But their consequences may have a much wider reach.

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<sup>71</sup> See DG COMP's database at <http://ec.europa.eu/competition/elojade/antitrust/nationalcourts/> – however it is not comprehensive or updated regularly.