

The co-operation between the national courts and the Commission in the application of EC competition rules

Contribution by Mr. Sven Norberg to the 2nd conference organised by the Association of European Competition Law Judges

Luxembourg – 13 June 2003

Captatio benevolentiae

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Honourable judges, Ladies and Gentlemen,

Before going into the topic of my contribution to today's conference, I would like to congratulate the Association of European Competition Law Judges with their initiative to organise this conference. Not only did they manage to invite a varied set of speakers, but they also got together a varied and **highly qualified audience of national and European judges**. That combination makes this conference an exceptional occasion to meet and discuss competition and other matters with colleagues from other EU Member States or from states that will join the European Union in less than a year. Tomorrow's workshop is a great opportunity in this respect, but I'm sure that also the coffee and lunch breaks as well as the dinner in today's program will offer many occasions to learn about each other's way of applying the rules, in this case the EC competition rules.

Indeed, [as Sir Christopher Bellamy explained in his introduction,] different from the present situation, national judges will, from 1 May 2004, be called upon to apply EC competition rules of Articles 81 and 82. You probably also heard or read comments from critics of the reform, particularly from industry, doubting whether national judges are well equipped to apply the EC competition rules. According to them, judges are not trained to apply rules that require a full-fledged economic analysis of facts and figures. I have to underline that I cannot in any way agree with those critics. On the contrary, **I am fully convinced that national judges - just like European and American judges - are well placed to apply competition rules**. The fact that we are talking about economic rules here does not change that conviction, why would it? In the end, competition law is still law and it needs the legal mind and the common sense of a judge to interpret those rules and to apply them to a concrete set of facts. Moreover, let's not forget that national judges have already been applying Articles 81(1), 82 and 86 EC for decades, and these provisions also require a complex economic analysis. The only change Regulation 1/2003 brings about is that national judges will from 1 May 2004 onwards also be able to apply Article 81(3) EC. I am therefore confident that also in the future, national judges will adequately and

vigorously enforce the EC competition rules as they enforce any other national or European rule.

That being said, I know from my discussions with some of you or your colleagues that in order to apply the EC competition rules vigorously, there exists **a demand from the side of the national judges to receive training in the application of the EC competition rules**. Such training should focus both on the legal and on the economic aspects of the application of those rules. It is because of the importance of such training that the Commission decided last year to co-finance conferences such as this one, which are aimed at the training of national judges in the application of Articles 81 and 82 EC. We surely hope that the European budgetary authority will allow us to continue to co-finance this type of activities in the years to come.

Turning now to the topic of my contribution, I would like in **a first part to focus on the application of EC competition rules by national judges**. Not being an economist but having myself a background as a judge who now for the last eight years in my daily work in the Commission has had to learn to apply these rules, I will try to first say a few words on what the European competition rules are basically about. Then I will address the competence of national judges to apply EC competition rules and finally, I would like to recall some basic principles of Community law, which help to ensure the coherent application of the EC competition rules throughout the European Union. **In a second part** - which I will keep more limited since the topic is also scheduled for this afternoon's panel discussion – I would like to outline the basic principles of **co-operation between the national judge and the Commission** in case the former applies EC competition rules. Of course, that form of co-operation exists already right now, but I hope to demonstrate how Regulation 1/2003 has clarified and further developed the co-operation mechanism.

I. The application of EC competition rules by national courts

A. The nature of EC competition rules

Before turning to those more legal aspects of the application of EC competition rules by national judges, I feel it is important to **reassure you on the more economic aspects of the application of EC competition rules**. Indeed, in the field of competition law economics is an unavoidable companion, since it regulates the conduct of economic operators in the markets. Economics do and should play an important role in the application of the rules. The use of economics greatly increases the likelihood of arriving at a result, which is consistent with the aims of the competition rules. Their aims are not just to prohibit certain categories of agreements and practices but to prohibit agreements and practices that produce or are likely to produce negative economic effects for society and consumers. The rules and their application must therefore be founded on sound economic principles.

One should, however, **not exaggerate the complexity of basic antitrust economics**. Basically, competition law aims to protect competition. The underlying premise is that markets in which there is effective competition will produce better products at lower prices than markets in which there is no effective competition. Resources are allocated and used more efficiently and consumers get more value for their money.

Let me explain: the price in an unregulated market is determined by the level of supply and demand. If supply exceeds demand, the suppliers will reduce their price in order to attract more consumers. If demand exceeds supply the opposite will happen. Prices will rise thereby reducing the number of consumers willing to purchase the product. If the suppliers voluntarily reduce their output, the market price increases as is demonstrated by the well-known OPEC cartel.

Companies in competitive markets have no or little power to individually influence the market price by altering their output. They are price takers and produce until the costs of producing one more unit of output exceeds the price that they can get for it. Firms respond to the law of supply and demand in the following way: when output exceeds demand producers that do not cover their costs will reduce their output or exit the market until the market is again in balance and until suppliers cover their costs and obtain normal profits. When demand exceeds output, suppliers obtain higher than normal profits. These higher profits encourage suppliers to produce more. They also attract new suppliers into the market. This process will continue until the market is again in balance.

In the case of monopoly or dominant firms the situation is different. The monopolist or dominant firm is not a price taker. Since it is the dominant supplier in the market the level of output that it chooses has a direct impact on the price. The more it sells the lower the price for all the products sold. Since companies are there to make profits, any rational monopolist will want to maximise its profits.

The quantity produced by the monopolist will be less than the output produced under effective competition and herein lies the foundation of competition law. Agreements and practices can enable firms to raise prices above the competitive level by reducing output and supply. This ability is what normally is referred to as market power.

Once this basic framework is grasped, it is in my view possible for lawyers to understand and assess arguments on whether or not an agreement or practice is apt to produce undesirable effects and for economists to explain in a comprehensible way why that is so.

B. The competence of national courts to apply EC competition rules

Turning now to the application of **EC competition rules** in a specific case, the Court of Justice has already in the early 70ies stated that those provisions of the EC Treaty **have direct effect**. National judges can therefore apply them (for Article 81(1) EC in the *BRT* case and for Article 82 EC in the *Sacchi* case (both 1974)). One should not forget though, that Regulation 17 gave an exclusive power to the Commission to apply Article 81(3) EC, the so-called exemption monopoly. The combined result of Regulation 17 and the case law of the Court of Justice is that already for almost 30 years, national courts are competent to apply Articles 81(1) and 82 EC. In order to help the national courts in applying those provisions, the Commission had also issued

a communication in 1993 on its co-operation with national courts. **In spite of this, we note that until this very moment national courts rarely applied EC competition rules.** One may wonder why that is so. Part of the explanation is that they were not allowed to apply Article 81(3) EC, which meant that a party could try to block national procedures by making a notification to the Commission. Another reason may be the fact that complainants often choose for the 'easy' alternative to come to the Commission, even if the latter cannot award damages. Yet another reason might be that parties' lawyers did not invoke the EC competition rules.

When drafting its proposal for the modernisation Regulation, the Commission was confronted with this problem of limited private enforcement of EC competition rules. Since the Commission considers private enforcement of EC competition rules an absolutely necessary complement to public enforcement of those rules by national competition authorities, a number of measures were introduced in the Commission proposal in order to stimulate private enforcement. However, since the proposal did not strive for a harmonisation of national procedural rules, private enforcement is still mainly stimulated via indirect ways.

First of all, Regulation 1/03 eliminates the exemption monopoly of the Commission. As a result, **the national judges will be able to fully apply Articles 81 and 82 EC without any restriction.** That power is confirmed in Article 6 of the Regulation. The Commission assumes that this elimination of the exemption monopoly and the related abolition of the notification system will stimulate complainants to go more to national courts and ask for damages. Private enforcement could thus increase as a result of the modernisation Regulation.

Secondly, and even more important, the Regulation (Article 3) imposes on national judges **the obligation to apply Articles 81 and 82 EC** as soon as they apply national competition law to agreements, decisions, abuses within the meaning of Articles 81 or 82 EC.

The possibility to apply EC competition rules has now been turned into an obligation to apply EC competition rules. That means that hundreds of enforcers join the Commission in the enforcement of Articles 81 and 82 EC. Such an obligation will, however, only contribute to a better enforcement of the rules if we can ensure a coherent application of the rules.

C. Coherent application of EC competition rules

A coherent application of the rules **requires first of all a homogeneous set of rules to be applied.** Secondly, coherent application of EC competition rules requires that the multitude of enforcers apply that homogeneous rule **in a uniform manner.** Let me further develop those two elements.

1. A homogeneous set of rules

In the *Walt Wilhelm* case, the Court of Justice accepted that national courts apply national competition legislation and EC competition rules in parallel. The new Regulation did not do away with this possibility of parallel application. However,

Article 3 of the new Regulation goes further than *Walt Wilhelm* as regards the application of Article 81 EC to agreements. **The Regulation requires that the outcome of the analysis under national law and under Article 81 EC must be the same.** That means, on the one hand, that agreements which do not contravene 81(1) EC or which fulfil all the four conditions of Article 81(3) EC cannot be illegal under national law. On the other hand, it means also that agreements which are in breach of Article 81(1) but do not fulfil the conditions of Article 81(3) EC cannot be declared legal under national law. Moreover, because of the legal exception system, these conclusions flow from the law itself and are not conditioned by any prior notification or any prior decision by an administrative authority.

Through this so-called **convergence obligation** undertakings that want to do business in Europe do not have to take into account 15 (and after enlargement of the European Union 25) different national legislations when drafting their agreements. By thus creating a level playing field, the convergence obligation clearly contributes to more coherence in the legislative framework for industry.

You might wonder whether this same ‘modernisation logic’ should not also have required a strict application of the convergence rule for cases of **unilateral conduct** by undertakings. I fully agree that this would have been a better option, but as some of you might now, this concession by the Commission during the negotiations in the Council was necessary to open the way to a final unanimous compromise on Regulation 1/2003. The Commission made that concession because it considered it far more important to have at this stage an obligation of convergence in the field of agreements than in the field of unilateral conduct. Indeed, the prohibition of agreements generally interferes much more with the commercial strategies of companies than the prohibition of certain types of unilateral conduct. It should be clear, though, that although the Regulation does not provide for the convergence obligation with regard to unilateral conduct, it still provides also in the case of unilateral conduct for an obligation for national judges to apply Community law, in this case Article 82 EC.

2. A uniform application by the national courts

Coherence as to the rules to be applied is of course only a first step. These rules should, however, also be applied in a uniform way by all the enforcers.

The question of how to secure uniformity and homogeneity in the application of community rules is certainly neither new nor unique for the field of competition law. The subject has already, since the entry into force of the Treaty, been of utmost importance for the good functioning of the community. A particular role has been given to the Commission as guardian of the Treaty to monitor the uniform application of community rules. The Treaty has also underlined the fundamental importance of the competition rules for the functioning of the common market by entrusting the Commission, the institution which is independent of the Member States, both to develop and execute the competition policy. Differently from other political areas where it above all has been entrusted to the Member States to implement community law in the national legal order the competition rules are directly established in the fundamental text of the Treaty and they are directly applicable in individual cases. In

this context it is of extraordinary importance that the ECJ in three vital "landmark judgments" delivered by the full court during the period when the work on the modernisation reform has been going on, underlined the particular importance for the Treaty and for the internal market of Articles 81 and 82. All three judgments have been delivered in cases where national courts have made references for preliminary rulings by the ECJ under Article 234.

In the first of these judgments, delivered in June 1999 in the case *ECO Swiss China Time v. Benetton*¹, the court underlined the quite particular position of these two provisions in the Treaty as forming part of the *ordre publique* implying, inter alia, that national courts, including arbitration tribunals, are obliged to respect and apply them ex-officio. The second judgment was delivered on 14 December 2000 in the case of *Masterfoods*². The court confirmed here that the Commission's decisions applying Articles 81 and 82 are binding upon all legal bodies within the community which have to apply these provisions and only subject to the judicial review which is exercised by the European Courts in Luxembourg. A national court can thus not give a judgment in a way which would imply that it goes against such a decision by the Commission, but has either to suspend the case and wait for a judicial review of the Commission decision or to make a reference for a preliminary ruling for the ECJ. The *Masterfoods* judgment led to the strengthening of the wording of Article 16 of Regulation 1/03, which expressly addresses the issue of uniform application. The third judgment was handed down on 20 September 2001 in the case *Courage v. Crehan*³. Through this judgment the court has finally clarified that an individual party, as a basis for an action for damages, can invoke the injury he has suffered due to an infringement against Article 81(1).

All three judgments are of extreme importance for the practical implementation and efficiency of the Modernisation Reform. Through these judgments the ECJ underlines also the importance of the role of the Commission with regard to ensuring the homogeneity in the application of Articles 81 and 82.

Against this background I would like to recall that the Regulation provides for a number of mechanisms to assist national courts in their application of EC competition rules. Before analysing those different mechanisms, I would, however, like to recall two basic principles of Community law, which flow from the case law of the Court of Justice and which are crucial for guaranteeing of coherence within the European Union

The first one is the principle of **primacy of Community law**. Already in the 60s, more generally in *Costa/Enel* and then in *Walt Wilhelm* as to the competition rules, the Court established the clear principle that national authorities may not contradict European law irrespective of whether the latter may be laid down in a Treaty provision, in the case law of the Court of Justice, Community legislation or a Commission decision.

Secondly, there is the **principle of legal certainty**, which the Court has applied to cases of **parallel or consecutive application of EC competition rules by both**

¹ Case C-126/97 [1999] ECR I-3055

² Case C-344/98 [2000] ECR I-11369

³ Case C-453/99 [2001] ECR I-6297

national and European authorities. Most important in this respect is the case law of the Court of Justice as first expressed in *Delimitis*⁴ and then developed in *Masterfoods*. I recall here that the Court of Justice first explained that the national courts could not take decisions, which run counter to a decision the Commission has already adopted. In case national courts would doubt the validity of the Commission decision, the only possibility to avoid its compulsory character is to ask the Court of Justice for an interpretation of the Community rule. Only if the Court of Justice sets aside the Commission decision may national courts decide against it. Secondly, the Court of Justice stated that in cases where the Commission has opened proceedings but did not come to a decision yet, national courts should avoid giving a decision which would conflict with the envisaged decision. It therefore recommended national courts to stay their proceedings until the Commission has decided or directly ask the Court of Justice for an interpretation.

Of course, this case law starts from the assumption that the Commission has dealt with or is dealing with a case, which is also pending before a national court (as was the case in *Masterfoods*). In most cases, that will, however, not be the scenario, and it is therefore important to have a closer look at the other coherence mechanisms which the Regulation provides for under those circumstances.

II. The co-operation between the Commission and the national courts

Before turning to the details of those co-operation mechanisms between the Commission and the national courts, allow me to make two general remarks which are important as background information in order to fully understand the scope of the co-operation mechanisms between the Commission and the national courts:

(a) First of all, **the co-operation mechanisms between the Commission and the national courts are obviously different from the ones that we have established with the national competition authorities.** Indeed, with the national competition authorities we have formed a European Competition Network (ECN), where cases are allocated within the group, information exchanged, draft decisions sent around and discussed. Within that network, the Commission acts as *primus inter pares*: as soon as the Commission opens proceedings, the others may not longer act. It goes without saying that such a system of co-operation could not be established with national courts – it was also not the desire of the Commission to do so – because it would go against the independence of the judiciary, which we want to respect at all costs. Another issue is if all national judges would themselves decide to form a kind of informal network, as e.g. the Association of European Competition Law Judges, which organised this conference. But that would obviously have a different scope

(b) Secondly, the co-operation mechanisms foreseen with respect to courts are meant to **assist the national courts.**

(1) On assistance, it should be clear that the help offered by the Commission **cannot in any way bind the judge.** Neither does it prevent the judges from

⁴ Ref X

seeking assistance from the Court of Justice under the preliminary rulings procedure (Article 234 EC).

(2) The assistance provided by the Commission under Article 15 of Regulation 1/03 is meant to help the judge, not the parties whose case is dealt with by the judge. Indeed, the co-operation mechanisms that I am about to explain are a service of the Commission to the national judges and have as sole objective to guarantee coherent application of EC competition rules throughout the European Union. **The Commission is thus trying to protect the general interest and not the private interest of anyone of the parties.**

Before going further, I would like to underline that in the Panel Discussion after luncheon today my colleague Mr Eddy De Smijter will elaborate further on the mechanisms for co-operation between the Commission and National Courts.

Turning now to the precise co-operation mechanisms between the Commission and the national courts as they are laid down in Article 15 these fall into two basic categories: (1) the possibility for national judges to ask the Commission for information and (2) the possibility for the Commission and for national competition authorities to submit written and oral observations to national courts.

A. The possibility for the national courts to ask the Commission for information

Article 15 of the Regulation first of all clarifies that the national judges may ask the Commission any *information* it has or its *opinion* on questions concerning the application of EC competition rules. This provision is an expression of the obligation of the Commission under **Article 10 of the EC Treaty** to assist the Member States in the application of EC competition law.

On the basis of Article 10 EC, the Commission is obliged to provide the national judge with **information** in its possession that the latter asks for. That information may be very general, like e.g. reports the Commission has drawn up, or it may be case-specific, where the judge wants to know whether there exist any precedents to the case or whether the Commission has or intends to open its own proceedings in the case. **The information asked for may be publicly available, but it may also be information that is confidential**, like e.g. business secrets. As a matter of principle, such information will be sent to the national judge. However, as the Court of First Instance has explained in the *Postbank*⁵ case, the co-operation with national courts may not lead the Commission to undermine the guarantees given to individuals by the Community provisions concerning professional secrecy. The Commission shall therefore inform the national court of the confidential nature of the documents it transmits. It is then **the responsibility of the national court to guarantee protection of the confidentiality of such information**. That means e.g. that the court cannot disclose that information to the parties in the case. In case the national court cannot sufficiently guarantee the confidentiality, e.g. because it is obliged under its national legislation to disclose the information to the parties, the Commission can refuse to send the confidential documents.

⁵ Ref X

Turning to the **opinions**, national judges can ask the Commission any question relating to a competition issue raised by the facts of a case and for its interpretation of the EC competition rules. Of course, the opinion of the Commission will only be indicative and an expression of the Commission view. Therefore it cannot be binding, as the final word regarding the interpretation of Community rules is left to the Court of Justice. [As Judge Wathelet just explained,] national courts can always turn themselves directly to the Court of Justice for a binding interpretation of the rules under the preliminary ruling procedure, which is provided for in Article 234 EC. I believe, however, personally that asking for a Commission opinion on a particular issue can be both useful and efficient in many cases e.g. if it concerns the clarification of a Commission Notice, Guideline or Block Exemption Regulation.

B. The submission of observations

Apart from the possibility for a national court to ask the Commission for assistance in a case it is dealing with, the Regulation provides for the possibility for the Commission and for the national competition authority to submit observations to national courts. For most Member States, this possibility constitutes a novelty. According to the Regulation, both have the right to submit written observations on their own initiative. For the Commission to do this, it is stated that this can be done where the coherent application of Articles 81 or 82 so requires. With the permission of the national court, the Commission and/or the national competition authority may also come to the court room and present oral observations.

Although these observations do not bind the national court, they will constitute an important tool for the Commission to draw the attention of a national court to an issue of coherent application of EC competition rules.

I want to underline that the Regulation merely provides for the possibility to submit observations to national courts, without elaborating the procedural context within which this new coherence instrument will be exercised. The Regulation only states that in order to allow them to adequately prepare their observations, the Commission and the national competition authorities may ask the court for documents, which they feel are necessary for the assessment of the case. It goes without saying that this information cannot be used for any other purposes. All other procedural issues like e.g. when should the observations be submitted or when and how can the parties in the case react to the observations, have to be dealt with under national law. The Member States will thus have to provide for the necessary procedural framework, thereby duly taking into account the rights of defence of the parties in the proceedings.

Evidently, the Commission will use this possibility only when the community interest of coherent application so may require. I believe that both forms of co-operation between national judges and the Commission, namely the possibility for national judges to ask the Commission for information and the possibility for the Commission to submit observations to the national courts create a framework which serves both as a guarantee for a coherent enforcement of EC competition rules and as a helpful

backing for the national judge, in case he encounters difficulties in the application of those rules.

III. Conclusion

Let me therefore, by way of conclusion, underline once more my confidence in national courts applying EC competition law. I hope to have demonstrated that the application of those provisions by national courts is an important aspect of the modernised enforcement regime of EC competition rules. And finally, I would like to express my hope and conviction that the mechanisms of co-operation between the national courts and the Commission that Regulation 1/2003 provides for, will turn out to be useful tools to assist the national judges throughout Europe in their application of Articles 81 and 82 EC.

Thank you for your attention.