COMPETENCE REVIEW: COMPETITION LAW

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I. INTRODUCTION

1. EU COMPETITION LAW: INTRODUCTION AND COMPETENCE

More than 125 jurisdictions around the world now have in place systems of competition law (or antitrust law as they are known in the US).[1] Such systems are, essentially, designed to protect the process of competition, and to deal with market imperfections arising, in a free market economy. Without competition law rules, firms may be free to act to distort the process of competition by, for example, colluding or merging with their competitors. Further, firms which win the competitive battle or 'natural' monopolies may be free to act without any competitive restraint being exercised over their behaviour.

The EU competition law rules derive from the original EEC Treaty (the Treaty of Rome). The activities of the EEC included, amongst other things, not only the creation of an internal market but also 'a system ensuring that competition in the internal market is not distorted'.[2] The principle of undistorted competition was thus embedded in the fundamental provisions of the Treaty as a mechanism for reinforcing, complementing and implementing other Treaty provisions and tasks, in particular, the functioning of the internal market.[3]

The EU rules are now set out in the Treaty on the Functioning of the European Union ('TFEU') and legislation adopted pursuant to that Treaty. The main competition provisions are set out in Title VII, Chapter 1:

- Articles 101-106 contain rules applicable to undertakings (broadly the term undertaking has been defined as any 'entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed…' (*Höfner*)[4]), including a prohibition of anticompetitive agreements between undertakings (Article 101) and a prohibition of abusive conduct of dominant undertakings (Article 102); whilst
- Articles 107-109 deal with state aid rules (dealt with in a separate report). Merger control was never contained expressly in a Treaty provision but is provided for in a Council Regulation.

The agreement establishing the EEA, creating a free trade area between the EU and the European Free Trade Area (EFTA) countries with the exception of Switzerland, also contains competition rules modelled on those set out in the TFEU (see Articles 53, 54, 57 and 59). This agreement effectively extends to the territory of the relevant EFTA States the EU competition rules and all the rules governing the internal market,

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1 In contrast, '[u]ntil the mid 20th century less than 10 competition regimes existed worldwide", http://unctad.org/en/Pages/DITC/CompetitionLaw/ResearchPartnership/Benchmarking-Competition.aspx

2 Art 3(f), later Art 3(1)(g) of the Treaty establishing the European Community (EC). Although following Lisbon this provision has been removed to Protocol 27 to the Treaties.

3 See Treaty on European Union (TEU), Art 3(3) and protocol 27.

4 Case C-41/90, *Höfner and Elsner v Macrotron* [1991] ECR I-1979, para 21.

including intellectual property.

The establishment of competition rules necessary for the functioning of the internal market falls within the EU's *exclusive competence*. This means that only the EU may adopt legally binding acts in relation to EU competition law unless it empowers Member States to do so. Nonetheless, the institutional arrangements governing the enforcement of the EU competition laws are specifically designed to be in accordance with the principle of subsidiarity,[5] and the following points should be noted:

(1) The EU competition rules apply only to potentially anti-competitive agreements and conduct of undertakings when they *affect trade between Member States* or to 'concentrations', or mergers, that have a *Community [now Union] dimension;* matters that do not have such an effect or dimension are of national concern only as they do not concern the functioning of the internal market (see II.1.A and II.3.C below);
(2) Articles 101 and 102 are *directly effective*; consequently these provisions can be enforced not only at the EU level by the European Commission (the 'Commission') but also at the national level – both by national competition authorities (NCAs) and national courts (see I.2 below);
(3) National competition law can be applied *concurrently* with Articles 101 and 102 so long as the principle of supremacy, and other fundamental principles, of EU law is respected. (see II.1 below);
(4) Although the EU merger rules cannot be enforced by national courts and NCAs, there are certain defined circumstances in which national merger rules can be applied concurrently with them (see section II.3 below).

It can be seen from this brief introduction that undertakings must consider whether EU competition law rules apply to their business conduct which affects trade between Member States or otherwise has an EU dimension. Further, that EU competition law rules can be enforced publicly, at the EU or national level, and/or privately through civil litigation before the national courts. Indeed, the UK's competition authority, sector regulators and national courts are obliged to apply EU competition law rules in certain circumstances.

Section 2 below introduces the core provisions of EU and UK competition law and outlines the enforcement process in greater detail. Section II then goes on to analyse the relationship between EU and national competition law and its implications in the UK more specifically.

2. EU AND UK COMPETITION LAW: CORE PROVISIONS AND ENFORCEMENT

A. THE EU COMPETITION LAW PROVISIONS

The EU competition law provisions are broadly as follows:

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[5] Council Reg 1/2003 [2003] OJ L1/1, recital 34 and Case T-168/01, *GlaxoSmithKline Services Unlimited* [2006] ECR II-2969, para 201.

i. **Article 101** prohibits restrictive agreements (or other joint arrangements) between independent undertakings. It is divided into three parts:
    - Article 101(1) prohibits 'all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect a prevention, restriction or distortion of competition within the common market';
    - Article 101(2) provides that such agreements are prohibited and restrictive provisions within them are void;[6] unless
    - It can be established by those relying on it that the agreement satisfies the four criteria for legal exception, or exemption, set out in Article 101(3) – broadly where specified benefits offset those restrictive effects and are passed on to consumers. Although any agreement which infringes Article 101(1) may in principle benefit from Article 101(3), in practice, it is a significant burden to establish that its four cumulative criteria are met. However, there is no need to establish that an agreement individually meets the conditions, if it falls within the 'safe harbour' of one of the block exemptions set out in an EU regulation (see iii below). These regulations grant 'exemption' from Article 101(1) to categories of agreements that satisfy specified conditions;

ii. **Article 102** prohibits 'any abuse by one or more undertakings of a dominant position' held within a substantial part of the internal market 'in so far as it may affect trade between Member States'. Unlike Article 101 which targets joint conduct, Article 102 focuses principally on unilateral conduct of dominant firms (or single-firm conduct);

iii. **Article 103** imposes an obligation on the Council to adopt Regulations or other legislation to give effect to principles set out in Articles 101 and 102. This provision has been used to enact crucial competition law provisions including:
    - Implementing Regulations (for example, Regulation 1/2003, see I.2.F below);
    - Regulations conferring power on the Commission to grant block exemption regulations (exempting categories of agreement from the Article 101(1) prohibition, see i above);
    - The EU Merger Regulation ('EUMR'), currently Regulation 139/2004[7] (enacted under Article 103 and Article 352 TFEU). Merger control rules were added to the competition law arsenal to ensure that the EU competition system was comprehensive and effective;

iv. **Articles 104-5** set out transitional provisions for the enforcement of Articles 101 and 102;

v. **Article 106** sets out rules to prevent Member States maintaining in force measures contrary to the competition and other Treaty rules and deals with the application of the competition rules (and other rules of the Treaties) to public

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6 As interpreted by Case 56/65, *Société La Technique Minière v Maschinenbau Ulm GmbH* [1966] ECR 235.

7 See now Reg 139/2004 [2004] OJ L24/1.

undertakings and those given special or exclusive rights by Member States. It contains a limited exemption (Article 106(2)) from the Treaty rules for such undertakings. That limitation has, however, been construed narrowly. Article 37 TFEU also requires Member States which have State monopolies of a commercial character to eliminate discrimination between nationals of Member States regarding the conditions under which goods are procured and marketed;

vi. **Articles 107-9** contain rules prohibiting Member States granting unlawful state aid to undertakings so as to distort competition.

B. INTERPRETATION OF EU COMPETITION LAW

The Court of Justice of the European Union (CJEU) which includes the Court of Justice (ECJ) and the General Court (GC[8]), together 'the EU Courts', has the task of interpreting the law set out in the Treaties and secondary legislation[9] and ensuring that, in their interpretation and application, the law is observed.[10] It is, therefore, for the EU courts to review whether the conditions of the EU competition laws are met when cases arise before them (see I.2.F.v below).

Nonetheless, the Commission has played an important part in the development of EU competition law and policy. Not only has it played a central part in enforcement (see I.2.F below), but it has also published a wide range of Communications and Notices (some of which are called 'Guidelines')[11] which play a significant role. These are important statements of how the Commission deals with certain matters and help undertakings build an understanding of how the competition rules will be applied in practice. The Notices may constitute a clarification of the substantive law and explain the approach the Commission takes to particular kinds of agreements, practices, or mergers[12] or set out the principles by which the Commission exercises its administrative discretion.[13] Most of the Notices are crucial to complete an overall picture of a particular competition rule and in practice they influence the way in which firms conduct business. The Notices do not have legislative force and are sometimes referred to as 'soft law'; nonetheless the ECJ has held that they may form rules of practice from which the Commission cannot depart in an individual case without breaching general principles of law such as equal treatment and legitimate

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8 The CJEU 'shall ensure that in the interpretation and application of the Treaties the law is observed': TEU, Art 17.

9 And Notices, insofar as these have some binding effect.

10 TEU, Art 19.

11 See eg, the Notice on the definition of the relevant market [1997] OJ C372/5; Notice on agreements of minor importance [2001] OJ C368/13; Notice on remedies acceptable under the Merger Regulation [2001] OJ C168/3.

12 Such as the Guidelines on vertical restraints [2010] OJ C130/1; Guidelines on horizontal cooperation agreements [2011] OJ C 11/1; Guidelines on the assessment of horizontal mergers [2004] C 31/5.

13 Such as the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 [2006] OJ C210/5 and Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases [2006] OJ C298/17 (the Leniency Notice).

expectation.[14] The Notices are not, however, binding on the courts or NCAs of the Member States.[15]

C. OBJECTIVES OF EU COMPETITION LAW

A question which is fundamental to the interpretation and application of the competition law rules is what is their objective? The EU Treaties do not define the core concepts set out in the competition law rules, such as a restriction of competition or an abuse of a dominant position, or explain what the relevant goals are. It has therefore been for the EU Courts to put flesh on, and to interpret, these provisions. The case-law makes it clear that Articles 101 and 102 both have the same goal(s).[16]

Although the ordoliberal school, which protects 'individual economic freedom of action as a value in itself' and restrains 'undue economic power',[17] appeared to influence early case-law and decisional practice, it does not have significant support as an objective today, even if apparent references to this goal can still be gleaned from EU Court case law.[18] The current view of the Commission is that the appropriate goal for Articles 101 and 102 is 'to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources';[19] they thus safeguard competition and the benefits of a competitive market (which generally delivers lower prices, greater choice, innovation and efficiency) from conduct which allows or will allow the relevant undertaking or undertakings to exercise *market power*, i.e.:

> 'the ability to maintain prices above competitive levels for a significant period of time or to maintain output in terms of product quantities, product quality and variety or innovation below competitive levels for a significant period of time.'[20]

Despite prevalent support for a consumer welfare approach, the case law of the EU Courts does not provide unambiguous support for it;[21] in *Post Danmark*,[22] however,

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14 See eg, Cases C-189, 202, 208 and 213/02 P, *Dansk Rørindustri A/S and Others v Commission* [2005] ECR I-5425, paras 209–13.

15 See eg, Case C-360/09, *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-5161.

16 Case 6/72 *Europemballage Corporation and Continental Can Company Inc v Commission* [1973] ECR 215, paras 24 and 25.

17 W Möschel, 'The Proper Scope of Government Viewed from an Ordoliberal Perspective: the example of competition policy' (2001) 157 *Journal of Institutional and Theoretical Economics* 4.

18 Case C-1/12, *Ordem dos Técnicos Oficiais de Contas (OTOC) v Autoridade da Concorrência*, 28 Feb 2013, paras 92-3 (Article 101); Cases 6&7/73, *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission* [1974] ECR 223 (Article 102).

19 Commission guidelines on the application of Article 81(3) [now Article 101(3)] of the Treaty (Art 101(3) Guidelines) [2004] OJ C101/97, para 13.

20 Art 101(3) Guidelines, ibid, para 25.

21 See eg, Case C-52/09, *Konkurrensverket v TeliaSonera Sverige* [2011] ECR I-527, para 22.

22 Case C-209/10, *Post Danmark v Konkurrencerådet* 27 March 2012.

the Grand Chamber of the ECJ gave a judgment which, although containing no express statement about the objectives of the law, did focus heavily on effects of the conduct on consumers. Further, there is no doubt that EU rules have also been applied as a mechanism to ensure the functioning of the internal market – that is, to prohibit conduct which 'might tend to restore the national divisions in trade between Member States…' and so frustrate this most fundamental objectives of the EU.[23] Although this is not an objective generally pursued by most other competition law systems, its importance is still reiterated by the EU Courts.[24]

An additional issue which arises is whether the competition law rules should pursue a *sole* economic goal or whether other socio-political or non-efficiency objectives can also be taken into account when applying them. Again, although consensus is growing that the sole goal of the rules should be consumer welfare, the fact that the EU competition rules form an integral part of the EU project over which the EU has exclusive competence means that it may be complicated to isolate competition policy from other EU policies so completely in this way. For example: Article 7 of the TFEU provides for consistency between all EU policies and activities 'taking all of its objectives into account and in accordance with the principle of conferral of powers'; certain matters are excluded from the scope of the rules on public policy grounds; and instances can be found of cases in which anti-competitive arrangements or conduct pursuing certain public policy goals, such as environmental protection, administration of justice and public health, have been held not to breach Article 101 and 102. Even though therefore Articles 101 and 102 do not in themselves refer to such public policy goals, the EU Courts have sometimes taken account of these factors. *In Wouters v Algemene Raad van de Nederlandse Orde van Advocaten*,[25] for example, the CJ found that rules adopted in the Netherlands which prohibited members of the Bar practising in full partnership with accountants did not have as their object or effect the restriction of competition. Although the arrangements restricted services that could be offered and reduced scope for efficiencies, the CJ concluded that it was not unreasonable for the Bar Council to take the view that these restraints were necessary for the proper practice of the legal profession.

D. COMPETITION, SPECIAL SECTORS AND EXCLUSIONS?

The basic position is that the competition rules cover all areas of the economy, including coal and steel which passed within the lex generalis of the TFEU once the coal and steel community treaty expired in July 2002. However, certain sectors have or do occupy a special position. For example:

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[23] Cases 56&58/64, *Établissements Consten and Grundig-Verkaufs v Commission* [1966] ECR 299, 340.

[24] See eg, Cases C-403&429/08, *Premier League Ltd v QC Leisure* and *Murphy v Media Protection Services Ltd*, 4 October 2011, para 139.

[25] See especially, eg Case C-309/99, *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577, paras 97.

i. Agriculture

The rules are modified in respect of agriculture: see Regulation 1184/2006[26] and Regulation 1234/2007.[27] The effect of these Regulations is that Article 102 applies to the production and trade of agricultural products as normal but that Article 101(1) only applies subject to exceptions for:[28] (i) agreements, decisions, and practices which form an integral part of national market organisations, (ii) agreements, decisions, and practices which are necessary for the attainment of the objectives of the CAP, and (iii) agreements between farmers or associations of farmers belonging to a single Member State not involving an obligation to charge identical prices.

ii. Regulated Sectors

In the last thirty years many State-owned, and often vertically integrated, monopolies throughout the EU have been wholly or partly privatized and the sectors they previously monopolized have been opened up to competition. The EU has pursued a far-reaching programme of liberalisation and harmonization in respect of the transport, postal services, energy, and telecommunications (electronic communications) markets.[29] Nonetheless regulatory rules are frequently required in these sectors, to deal with a number of problems which remain, including: how to deal with those that own networks (such as railway lines or telephone lines) which cannot feasibly be duplicated and where control of the network may create a 'bottleneck' monopoly which hinders downstream competitors; and how to ensure universal supply of crucial services – such as the supply of water, sewage and basic postal services. Regulatory rules (implemented by regulators) frequently impose a 'universal service obligation' (USO) and provide for controls on prices and quality, terms of contracts to be fixed and polices for access by downstream competitors. The relevant EU sector legislation may require the establishment of an independent, national regulatory authority (NRA)[30] and specify in detail the powers and duties it must possess. EU law also imposes duties on NRAs.

Although conceptually similar, there are some important differences between regulation and competition law. For example: some regulation pursues public policy objectives as well as encouraging or promoting competitive markets; regulation generally acts ex ante (in advance) whereas competition law (other than merger control) normally acts ex post (reacting to conduct which is taking place or has taken place); competition authorities generally try to avoid behavioural remedies whereas

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26 [2006] OJ L214/7.

27 [2007] OJ L 299/1.

28 The agricultural products to which the regulations apply are set out in TFEU Annex I. The exceptions are contained in Art 2 (1) of Reg 1184/2006.

29 It has been pursued, in particular, through directives adopted under the special procedure laid down in Art 106(3) TFEU, see II.2 below and through Council harmonization directives under Art 114 TFEU.

30 The functions of the regulators differ between sectors and different states organize regulation differently. The regulators in the UK include OFWAT (water), OFGEM (energy), the Rail Regulator and, pursuant to the Communications Act 2003, OFCOM.

sector regulators provide detailed rules on matters such as prices and conditions which require close monitoring; regulators may be affected by their closeness to the market players and to the government; and regulation is generally intended to be temporary – only until competition is allowed to develop effectively and sufficiently in the markets. The Commission favours the replacement of regulation and enforcement of ex ante sector specific rules with competition law whenever possible.

EU competition laws apply to regulated sectors alongside regulatory regimes (in some Member States, including the UK, NRAs may apply competition rules as well as regulatory rules[31]). Indeed, the Commission has been active in enforcing the competition rules in the liberalised sectors, such as gas, electricity and telecoms, even where an NRA may have already acted ex ante. In this respect, the EU authorities have taken a quite different approach to the US courts which have generally been reluctant to apply ordinary antitrust (competition) law to conduct in the regulated telecommunications sector on the grounds that it is the regulatory regime which is designed to deter and remedy anti-competitive harm in these markets.[32] The approach in the EU thus appears to be the competition laws should supplement, through ex post review, the legislative framework adopted by the Union legislator for liberalisation and ex ante regulation.[33] The Commission has not been shy about adopting both infringement and commitment decisions in this sphere: indeed, arguably, it has actively used the commitments procedure to pursue regulatory goals in furtherance of its liberalisation agenda.[34] It is no defence to such entities that there conduct has been approved by a NRA under regulatory rules if it is not required by national law. If, however, the undertaking at issue is entrusted with the provisions of services of general economic interest, a derogation from the competition rules applies if it can be established that the application of the rules would obstruct the undertaking in the provision of those services (see section II.2).

iii. Exclusions

Articles 101 and 102 do not contain any express exclusions. Nonetheless, some arrangements are excluded from these provisions. For example, the scheme of the Merger Regulation is such that, generally, merger transactions that constitute a 'concentration' are assessed not under Articles 101 and 102 but either under any applicable national competition legislation, or, where the transaction has an EU dimension, under the provisions of the Merger Regulation itself (see II.3 below). It has also been seen that Regulation 1184/2006 provides that certain agricultural agreements are excluded from Article 101. Further: (i) Article 346(1)(b) TFEU provides that nothing in the Treaty shall preclude the application by Member States of

31 See I.2.H.

32 *Verizon Communications Inc v Trinko LLP* 540 US 398, 124 S Ct 872 (2004).

33 Case C-280/08 P, *Deutsche Telekom v Commission* [2010] ECR I-9555, para 92.

34 See eg, Case 39.386 *EDF—Long Term Electricity Contracts in France*; COMP/B-1/337.966 *Distrigaz* [2008] OJ C9/8; COMP/39.316 *GDF, Gas market in France* OJ C57/13, IP/09/1872, 3 Dec. 2009; COMP/39.388 *German Electricity Wholesale Markets* and COMP/39.389 *German Electricity Balancing Markets* **(***E.ON***)** [2009] OJ C36/8; Case COMP/39.402 *RWE—Gas Foreclosure***,** [2009] OJ C133/9; COMP 39.317 *E.ON (Gas), [2010] OJ C278/9, 4 May 2010*; COMP/39.727, *CEZ* , IP/13/320, 10 April 2013.

measures 'it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions, and war material'(see II.3.D below); and Article 106(2) TFEU provides that the competition rules do not apply to some activities of public bodies or bodies entrusted with public services (see II.2 below). In interpreting the elements of Articles 101 and 102, the CJ has also excluded certain conduct from their scope; for example, agreements belonging to the realm of social policy[35] and the conduct of firms which are not 'undertakings' as they are they carrying out tasks of a public or social nature, not economic activity.[36]

E. COMPETITION LAW AND INTELLECTUAL PROPERTY

Intellectual property rights (IPRs) grant the holder of the right an exclusionary, and sometimes exclusive, right to the exploitation of the product of the human intellect. The importance of IPRs in the modern commercial world is incontrovertible, but their interaction with EU law is complex. Although the relationship between IPRs and competition law has sometimes been an uneasy one, it is now generally accepted that IPRs and competition law do not have conflicting aims but, rather, pursue consistent ones – the improvement of innovation and the promotion of consumer welfare (albeit through different means). Nonetheless, the extent to which the free movement or competition law provisions can constrain the exercise of IPRs is controversial. Problems arise at the interface of IP law and competition law (and also the EU free movement rules) in three main ways:

(i) Despite the introduction of some EU-wide rights,[37] IPRs are still typically granted by national laws and enforced on a national basis, conferring protection within national territories. This inevitably leads to a conflict with the EU internal market objective since simple reliance on a national right could be used as a mechanism to prevent importation of a good or service from another Member State;

(ii) IPRs may erect barriers to entry to a market and thus affect the determination of whether an undertaking has market power and, in particular, holds a dominant position for the purposes of Article 102. In some exceptional cases, the ECJ has held that the exercise by a dominant IPR-holder of its IPRs may constitute an abuse of that dominant position; for example, a refusal to licence IPRs[38] or charging an excessive royalty.[39] In *Huawei Technologies v ZTE*, the Regional Court of Düsseldorf (Landgericht Düsseldorf) has asked the ECJ[40] whether, and if so when, it might

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35 Case C-67/96, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751.

36 See n 4.

37 See eg, W. Allan, M. Furse, and B. Sufrin (eds.), *Butterworths Competition Law* (Butterworths, looseleaf), Div V, chap 1.

38 See eg, Cases C-241–242/91 P, *RTE & ITP v Commission* [1995] ECR I-743

39 See eg, Cases C-403 and 429/08, *Premier League Ltd* n 24, paras 108-109 and Case COMP/38.636, *Rambus*, 9 December 2009.

40 C-170/13 (judgment pending).

constitute an abuse of a dominant position contrary to Article 102 for a patent holder - in this case the holder of a standard-essential patent (SEP) which had given a commitment to license that SEP to all third parties on fair, reasonable and non-discriminatory ('FRAND') terms - to seek an injunction against a potential licensee of the patent. If the ECJ were to hold that such conduct did constitute an abuse in certain circumstances, a national court would not be able to make an injunction available to the patent holder in these circumstances without violating its obligations under EU law. In some jurisdictions this might operate as a severe limitation on the application of national laws governing patents and injunctions (in Germany, for example, German law generally requires, save in exceptional circumstances, the grant of an injunction to patent holder whose patent is found to have been infringed[41]), see further II.1.D.viii.

(iii) Transactions involving IPRs may also constitute agreements falling within Article 101. Holders of IPRs often exploit them not by producing products or services exclusively themselves but, additionally or alternatively, by licensing others to use them (or assigning rights to them). The terms of such licences may involve restrictions of competition, including territorial restrictions which divide the internal market. Settlements of patent disputes have also been found by the Commission to contravene Article 101 in certain circumstances.[42]

F. ENFORCEMENT OF THE EU COMPETITION LAW RULES

Articles 101 and 102 (the 'antitrust' rules) are directly effective and can be enforced: (1) publicly, by a network of competition authorities, the European Competition Network (ECN), comprised of the Commission and the national competition authorities (NCAs) of the Member States – which includes in the UK both the competition authority and sector regulators (see I.2.H below); and (2) privately, through civil litigation in the national courts. The EU Merger Regulation, which sets out a system of ex ante merger control, is enforced exclusively by the Commission.

The Commission also has power to enforce the EEA competition rules, together with the EFTA Surveillance Authority (the Authority) and the competition authorities of the EEA states. Essentially, the basic rule is the Commission will take exclusive jurisdiction where trade in the EU is affected to an appreciable extent.[43] The Authority is, however, generally responsible for arrangements which affect trade (i) only between the EFTA States or (ii) one or more EFTA States and the EU in circumstances where the turnover in the EFTA states of the undertakings concerned is equivalent to 33% or more of their total EEA turnover. In merger cases , the Commission has jurisdiction over all mergers with an EU dimension, whilst the Authority deals with cases that have an EFTA but not an EU dimension.

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41 See PatG, s 139(1) (German Patent Law) and T Körber, *Standard Essential Patents, FRAND Commitments and Competition Law* (Baden-Baden, Nomos, 2013), 186. This is in contrast to the position eg, in the US (see *eBay Inc v MercExchange, LLC* 547 US 388 (2006)) and in some other Member States where the courts exercise more nuanced approaches and have been more cautious about granting final injunctions in cases involving SEPs.

42 See eg, Case 39226, *Lundbeck* 19 June 2013.

43 EEA Agreement, Art 56(1)(c) and (3).

i. Enforcement by the Commission

Enforcement by the Commission of both EU antitrust and merger rules follows the integrated agency model – the Commission performs investigative, enforcement and adjudicative functions. In antitrust proceedings the Commission thus acts, pursuant to powers conferred on it by Regulation 1/2003[44] and Regulation 774/2003 (the Implementation Regulation),[45] as an integrated decision-maker in an administrative procedure with power:

- To investigate whether an infringement has been committed (using broad investigative powers, including the power to obtain information through market inquiries, requests, interviewing persons and/or, with the participation of NCAs, conducting investigations (sometimes without warning, so-called 'dawn raids') at business or even certain non-business premises[46])),
- to initiate proceedings, through the issuing of a statement of objections;
- to issue decisions;[47] and
- to order infringements to be brought to an end and to impose fines upon undertakings (of up to ten per cent of their world-wide turnover) found to be in breach.

The Commission does not therefore have to prove that the substance of an infringement has been committed before an independent tribunal or court (as it would have to under a judicial model). Rather, it adopts its own decisions and imposes penalties which are subject to review by the EU courts under Article 263 and 261 TFEU respectively (such challenges are normally made in the first instance to the GC[48] with an appeal on points of law to the ECJ[49]), see further I.2.F.v below. Although the Commission's merger powers[50] are, reflecting the different nature of the two processes, not identical to those governing antitrust enforcement, they do nonetheless closely follow them. The objective of the merger review system, however, is not to prohibit, ex post, conduct which violates the rules but to identify and, if necessary prohibit, ex ante, mergers which, if completed, would lead to a significant impediment to effective competition in the EU.

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44 The model was first set up by Reg 17 [1959–62] OJ Spec Ed 87, and is now set out in Reg 1/2003, n 5.

45 [2004] OJ L123/18.

46 Reg 1/2003, n 5, arts 18-20.

47 The final decisions are actually taken by the College of Commissioners, a body of political appointees which have not been involved in the hearing or heard any of the evidence adduced

48 See TFEU Art 256(1) and the Protocol on the Statute of the CJEU, Art 51, Cases C-68/95 and C-30/95, *France v Commission* [1998] ECR I-1375.

49 Protocol on the Statute of the Court of Justice, Art 51.

50 Set out in the EUMR itself and its implementing provisions, see II.3 below.

It is generally accepted that the integrated agency model provides the opportunity for an expert and specialised agency to adopt and contribute to the development of a coherent competition policy and to accurate and efficient decision-taking. Nonetheless, the EU model has provoked considerable controversy over the years which has been fuelled by a number of factors including: the fact that the Commission's investigations have become less administrative/ inquisitorial in nature and have taken on a more adversarial/ prosecutorial appearance; the fact that levels of fines imposed by the Commission in its antitrust infringement decisions have increased exponentially in the last fifteen years; and the development, and increasing importance in the EU, of European Convention for the Protection of Human Rights ('ECHR') principles and case law.

Indeed, as it is now widely accepted that competition law fines and antitrust procedures are of a 'criminal' nature for the purposes of Article 6 ECHR,[51] the important question which has come to the forefront is whether the system, and/or particular aspects of it, not only upholds standards of good administration[52] and fundamental principles of EU law, especially the rights of the defence,[53] but also respects ECHR and EU Charter rights; especially, the right to respect for private and family life, home and communications, see Article 8 ECHR (and Article 7 of the EU Charter), the principle of effective judicial protection[54] and the right, within a reasonable time, to a fair trial before an independent and impartial tribunal,[55] see Article 6 ECHR and Article 47 of the EU Charter. Collectively, these provisions establish crucial rights for undertakings being investigated for possible violation of the antitrust laws - including the right: to a presumption of innocence;[56] to a public hearing before an independent and impartial tribunal; to give evidence in one's own defence; to have access to the evidence against one, and the supporting evidence; to be able to examine and cross-examine witnesses;[57] and to be given reasons for a decision.

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51 And in spite of their characterisation in Reg 1/2003, n 5, as administrative charges, see eg, *Engel v Netherlands* (1979-80) 1 EHRR 647, *Menarini Diagnostics S.R.L v Italy*, App 43509/08, judgment 27 September 2011, and most recently eg, Sharpston AG in Case C-272/09 P, *KME Germany AG v Commission* Opinion, 10 February 2011, para 64.

52 EU Charter, Art 41.

53 Case C-511/06 P, *Archer Daniels Midland v Commission* [2009] ECR I-5843, para 84.

54 Case C-389/10 P, *KME Germany AG v Commission* 8 December 2011.

55 *Jusilla v Finland* (2007) 45 EHHR 39. See eg, I Forrester, 'Due Process in EC competition cases: A distinguished institution with flawed procedures' (2009) *EL Rev* 817, W Wils, 'The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights' (2010) 33(1) *World Competition* 5, I Forrester, 'A Bush in Need of Pruning: the Luxuriant Growth of "Light Judicial Review"', in C-D Ehlermann and M Marquis *European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart Publishing, 2010), 407; W Wils, 'EU Antitrust Enforcement Powers and Procedural Rights and Guarantees: The Interplay between EU Law, National Law, the Charter of Fundamental Rights of the EU and the European Convention of Human Rights' (2011) 2 *World Competition* 189.

56 See EUHR, Art 6(2) and EU Charter, Art 48(1).

57 *Jusilla v Finland* n 55.

Over the years, commentators and practitioners have complained that the EU enforcement structure does not sufficiently respect these rights, and especially does not ensure the investigated undertakings' right to a fair trial. Core concerns which have been raised about the EU integrated agency model are that: it does not provide for a hearing before an independent decision-maker; it creates the risk of 'confirmation' and 'hindsight' bias (so affecting the Commission's ability to take independent and balanced decisions); it does not fully respect the rights of the defence; it provides for the final decision to be adopted not by the DGComp officials that preside over the proceedings but by the full college of Commissioners who have not heard or seen the evidence (the parties do not therefore plead their case before the actual decision-maker); and that the limited review of the Commission's decisions by the GC is insufficiently rigorous or intense (see I.2.F.v below). This has led some to protest that the model cannot adequately protect the rights demanded in a 'criminal' procedure or give effect to the presumption of innocence, and that profound change is warranted, for example, through separating the investigation, prosecution, and decision-making functions within the Commission or the creation of a separate 'competition court' as an independent first instance adjudicator.

Despite these arguments, there is considerable support for the view that no wholesale overhaul and restructuring of the EU enforcement system is required to meet EU and ECHR principles.[58] Indeed, the case law of the European Court of Human Rights (ECtHR) suggests[59] that use of an integrated agency model may be compatible with Article 6[60] in competition cases so long as the preliminary decision-taking procedures are governed by sufficiently strong procedural guarantees and such decisions are subject to judicial control by a body with 'full jurisdiction' on questions of fact and of law and with power to quash challenged decision in all respects.[61]

ii. Enforcement of Articles 101 and 102 by NCAs

Initially the Commission played the central role in the enforcement process. This was partly because, from 1962-2004, it had the exclusive right to rule on the compatibility of an individual agreement with Article 101(3) and so to exempt individually agreements from the Article 101(1) prohibition (following the notification of the agreement to it).[62] This set up meant that it was difficult for NCAs and national courts to play a meaningful role in the enforcement process. From 1 May 2004, however, Regulation 1/2003 removed the Commission's exclusive competence to apply Article

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58 See eg, J Almunia, SPEECH/10/449, Due process and competition enforcement, Florence, 17 September 2010 and A Italianer, Safeguarding due process in antitrust proceedings; Fordham Competition Law Institute, 23 September 2010.

59 ibid and see eg, W Wils, 'The Compatibility with Fundamental Rights of the EU Antitrust Enforcement System in which the European Commission acts both as Investigator and as First-instance Decision Maker' (2014) 37(1) *World Competition* forthcoming.

60 Case law of the ECtHR establishes that proceedings which may culminate in the imposition of a criminal penalty involving civil or 'minor' (non-core) criminal offences require less stringent safeguards and protection than that required in cases of 'core' criminal offences.

61 See Case E-15/10, *Posten Norge v EFTA Surveillance Authority*, 18 April 2012, para 99.

62 Reg 17, n 44, Art 9(1).

101(3).[63] Regulation 1/2003 thus paved the way for greater enforcement of the rules at the national level and sets out provisions designed to encourage decentralised enforcement and to ensure consistency in application and interpretation by the different decision-makers. Indeed, Regulation 1/2003 requires Member States to designate NCAs to enforce Articles 101 and 102[64] and that such NCAs are obliged to apply Articles 101 and 102 when applying national competition law to agreements or conduct which affects trade between Member States.[65] NCAs may adopt infringement or commitments decisions, order interim measures and impose fines or other penalties provided for in their national law.[66] Indeed, in *Bundeswettbewerbsbehörde and Bundeskartellanwalt v Schenker & Co AG* the ECJ held that in order to ensure the effectiveness of the rules, NCAs are obliged to impose a fine on an undertaking that has infringed Article 101 intentionally or negligently, unless the undertaking's cooperation has been decisive in detecting and actually supressing the cartel.[67] Although Regulation 1/2003 specifically provides that NCA can decided that there are no ground for action on their part, in *Tele2Polska*[68] the ECJ interpreted the Regulation in a way which imposes significant limits on the powers of the NCAs. It held that it does not permit NCAs to adopt decisions finding that Article 102 (or Article 101) has *not* been infringed.

The degree of 'independence' of NCAs, their institutional structure and procedural powers, varies from Member State to Member State. Questions of institutional choice and procedure have thus, as a general rule, been left to the Member States and there is considerable diversity in the national procedural enforcement frameworks. Although therefore in some Member States (including the UK) NCAs have the power to fine undertakings in breach of Articles 101 or 102 (and/or national equivalents) following an administrative procedure similar to that followed by the Commission, in some Member States a judicial model is followed. In Ireland, for example, such a model is required by the Constitution which generally requires justice to be administered, and fines imposed, by the courts not administrative bodies.

In some Member States, NCAs may be able to impose a broader range of sanctions than those that exist at the EU level – including sanctions for individuals as well as undertakings. For example, some NCAs may impose civil fines on individuals following an administrative procedure[69] and, in the UK, directors of companies that have breached the rules may be disqualified from acting in that capacity for up to 15 years.[70] Further, a growing number of NCAs now have the power to pursue criminal

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63 Reg 1/2003, n 5, recitals 6-8 and arts 5 and 6.

64 ibid, Art 5.

65 ibid, Art 3(1).

66 ibid, Art 5.

67 Case C-681/11, 18 June 2013.

68 Case C-375/09, *Prezes Urzędu Ochrony Konkurencji i Konsumentów* v. *Tele2 Polska sp. z o.o., now Netia SA SA* [2011] ECR I-3055.

69 See eg, ICN Cartels Working Group 'Defining Hard Core Cartel Conduct, Effective Institutions, Effective Penalties'(2005), 64-65.

70 Enterprise Act 2002 (EA02), s 204, see I.2.G&H below.

proceedings against individuals (and/or corporations) who have caused their firm to make, or to implement, horizontal cartel agreements or forms of it, such as bid-rigging (see for example I.2.G below).[71] Further, in a number of Member States NCAs have a remit which is broader than just the enforcement of the competition law rules; for example, some have competence in regulatory fields and some (as in the UK) have competition law and consumer protection functions.

The Commission has some concerns about the 'autonomy' the current system affords to Member States in terms of institutional design and procedural rules governing public enforcement. It is therefore considering whether further action should be taken to tackle national institutional and procedural divergences which may detract from transparency, legal certainty and a level playing field for undertakings.[72] Although the work of the ECN may go some way to tackling these issues the Commission is reflecting on the question of whether further harmonisation measures might be required. If the Commission does pursue this route, the issue of whether, and/or the extent to which, the EU has competence to harmonise in this sphere may prove to be controversial.[73]

iii. Who acts: the Commission or NCAs?

Article 11(1) of Regulation 1/2003 provides that 'the Commission and the competition authorities of the Member States shall apply the [EU] competition rules in close cooperation'. It has been seen that together the Commission and NCAs form the ECN, a network designed to ensure the success of the decentralised system, that the authorities operate according to common principles and in close collaboration and that the competition rules are applied effectively and consistently. Regulation 1/2003 contains provisions dealing with cooperation between the Commission and the NCAs. Further, the Joint Statement of the Council and the European Commission on the Functioning of the Network of Competition Authorities (the Joint Statement)[74] sets out the main principles governing the ECN which provides a forum to: facilitate the allocation of cases; to foster cooperation in the conduct of investigations and the sharing of information; and ensure a continuous dialogue between the ECN authorities both in relation to cases and competition policy, law and practice. The Commission's Cooperation Notice provides fuller and more specific detail of cooperation and division of work. Under the modernised system Article 101 and 102 cases can be dealt with by:

- A single NCA (possibly with the assistance of others);

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71 See I.2.G below.

72 See Report on the function of Regulation 1/2003 and accompanying Commission Staff Working Paper (2009).

73 K Cseres, 'EU Competition Law and National Competition Laws' in I Lianos and D Geradin (eds) *Handbook on European Competition Law: Enforcement and Procedure* (Edward Elgar, 2013).

74 Joint Statement of the European Council and the European Commission on the functioning of the network of competition authorities, 10 Dec. 2002, available at <http://ec.europa.eu/competition/ecn/joint_statement_en.pdf>.

- Several NCAs acting in parallel; or
- The Commission.[75]

Broadly, the principle that applies is that a case should be dealt with by the authority 'best placed' to deal with it and best able to restore or maintain competition in the market.[76] In order to be well placed, there must be a material link between the infringement and the territory of the authority (the conduct has substantial direct actual or foreseeable effects in the territory), the authority must be able to bring the entire infringement effectively to an end (either on its own or in parallel with another authority), and the authority must be able to gather the evidence required (whether or not with the assistance of another authority).[77] A single NCA is usually well placed to deal with agreements or practices that substantially affect competition mainly within its territory. Where two or more NCAs are well placed to act, then one NCA only should act where the action of one would be sufficient to bring the entire infringement to an end. If it would not, then two or more NCAs should act. The authorities should coordinate their action and where possible designate a lead authority for the case.[78]

The Commission is likely to be best placed to deal with an agreement or practice where: it has effects on competition in three or more Member States (for example, where two undertakings agree to share markets or fix prices for the whole territory of the EU or where an undertaking, dominant in four different national markets, abuses its position by imposing fidelity rebates on its distributor in all these markets); the conduct is linked with other Union provisions which may be exclusively or more effectively applied by the Commission; or the Union interest requires it (to develop competition policy or to ensure effective enforcement).[79]

If the Commission does initiate proceedings, Article 11(6) of Regulation 1/2003 provides that NCAs may not apply Articles 101 and 102. This provision confers significant power on the Commission and leverage over NCAs. The Cooperation Notice indicates however that it will only rarely initiate proceedings where a case has initially been allocated to another NCA and it appears that this provision has never been relied upon by the Commission to remove jurisdiction from an NCA.

Regulation 1/2003 contains provisions designed to ensure that allocation takes place quickly, that NCAs and the Commission inform each other of investigations and for close cooperation between them. It also provides, subject to safeguards designed to protect the rights of defence,[80] for the transfer of information between authorities and clarifies that an authority can suspend proceedings or reject a complaint on the grounds that it is being dealt with by another authority.

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75 Commission Notice on Cooperation within the Network of Competition Authorities (Cooperation Notice) [2004] OJ C101/43, para 5.

76 Joint Statement, n 74, paras 11–14.

77 Cooperation Notice, n 75, para 8.

78 Joint Statement, n 74, para 18.

79 ibid, para 19. Cooperation Notice, n 75, paras 14 and 15.

80 See especially Arts 11-21.

Despite the creation of the ECN and shared enforcement of the rules, the Commission has sought to retain its central role 'as the guardian of the Treaty' which 'has the ultimate but not the sole responsibility for developing policy and safeguarding consistency when it comes to the application of EC competition law'.[81]

iv. Private enforcement of Articles 101 and 102 before the national courts

The TFEU contains no specific provision governing private rights of action for damages or injunctions following a violation of the EU competition law rules.[82] Private proceedings in the national courts are, however, possible by virtue of the fact that Articles 101 and 102 have direct effect. EU law requires national courts to protect the rights which individuals derive from directly effective provisions of EU law and, in certain circumstances, to award damages to those that have been injured by a breach.[83] A claimant that has been, or is being, injured by an agreement or conduct that infringes Article 101 or 102 may, for example, bring private proceedings before a national court seeking a declaration of nullity, an injunction and/or damages to compensate loss suffered as a consequence. It may also defend an action against it on the grounds that a violation of the rules has been committed. Although, up until quite recently there has been relatively little 'antitrust litigation' brought by private individuals before national courts, such litigation is now growing and, indeed, thriving in some Member States, including the UK. Private civil actions are thus beginning to play an increasingly important role in competition law enforcement.

v. Role of the EU Courts

In the context of EU competition law the EU Courts hear two main types of action; reviews of the acts of the Commission and references from national courts.

First, the CJEU has power to review fines and Commission decisions under Articles 261 and 263 TFEU respectively. These provisions confer unlimited jurisdiction to cancel, increase, or reduce fines (Article 261),[84] and the power to review the legality of the Commission's decisions in judicial review proceedings under Article 263.[85] Challenges are normally made in the first instance to the GC. Although the GC has developed considerable competition law expertise, it is seen below that the question of

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81 Cooperation Notice, n 75, para 43.

82 Contrast the position in the US, see Clayton Act 1914, ss 4 and 16.

83 Case C-453/99, *Courage Ltd v Crehan* [2001] ECR I-6297. See also Cases 295–298/04, *Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6619.

84 The GC has been tolerant of the Commission's general approach to fining and the increased level of fines to deter infringements, see eg, Forrester, 'A Bush in Need of Pruning', n 55.

85 If the Commission (or GC) has breached EU law an action for damages may also be available against it under TFEU, Art 340, see eg, Case C-440/07 P, *Commission v Schneider Electric* [2009] ECR I-6413, Case 53/84, *Stanley Adams v Commission* [1985] ECR 3595 and Case C-352/98 P, *Bergaderm and Goupil v Commission* [2000] ECR I-5291.

whether the review conducted is intense enough to satisfy human rights requirements is a moot one. Appeals on points of law can be made from the GC to the ECJ.[86]

Article 263 provides four grounds for challenging the Commission's acts (competition decisions and other acts capable of affecting individuals' interests): lack of competence; infringement of an essential procedural requirement; infringement of the Treaties or of any rule of law relating to their application; or misuse of powers. Competition cases are most frequently based either on pleas of procedural defects or on the broad head of infringement of the Treaty or of any rule of law, including general and human right principles. This latter head enables challenges to be made on the basis that the law has been misinterpreted or misapplied but also on the basis that the Commission committed a 'manifest error of appraisal'[87] and that the evidence relied on, or the facts established, by the Commission do not support the finding of law. Although the GC does not rehear the case as it would if there was a full appeal on the merits, the GC does examine facts to determine whether the factual basis of the Commission decision was correct or sufficient and that the Commission has produced 'sufficiently precise and coherent proof' to support its case.[88]

A controversial aspect of the Article 263 review is that with regard to 'complex technical appraisals'[89] relating to the Commission's economic assessment, the GC states that it conducts only a limited review, and will not substitute its own assessment of matters for that of the Commission:

> 'examination by the Community judicature of the complex economic assessments made by the Commission must necessarily be confined to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers'.[90]

Some take the view that because such a 'limited review' is conducted, displaying deference to the Commission when acting within its margin of appreciation, the EU system is flawed as it does not guarantee a right to a fair trial.[91] Others point to the fact that in some cases the GC has, despite this language, in fact conducted a very exacting, intensive and exhaustive review of the Commission's decisions. For example, in a series of merger cases the GC has rigorously reviewed the Commission's decisions to determine whether it had discharged its burden of establishing how the concentration might in the future alter the factors determining the state of competition on a market and whether it would give rise to an a significant

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86 Protocol on the Statute of the Court of Justice, Art 51.

87 Case 42/84, *Remia & Nutricia v Commission* [1985] ECR 2545, para 34.

88 See eg,Cases 29 and 30/83, *CRAM and Rheinzink v Commission* [1984] ECR 1679, para 20; Cases C-89/85, etc., *A Ahlström Oy v Commission* [1993] ECR I-1307, para 127.

89 Case T-201/04, *Microsoft v Commission* [2007] ECR II-3601, para 88.

90 Cases C-204, 205, 211, 213, 217 and 219/00 P, *Aalborg Portland and others v Commission* [2004] ECR I-123.

91 See I.2.F.i above and Forrester, 'A Bush in Need of Pruning' n 55.

impediment to effective competition on the market.[92] In *KME*,[93] the ECJ rejected the argument in that case that the GC had violated the applicant's fundamental right to full and effective judicial review,[94] and had deferred too much to the Commission's discretion, holding that:

> 'whilst, in areas giving rise to complex economic assessments, the Commission has a margin of discretion with regard to economic matters, that does not mean that the Courts of the European Union must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must those Courts establish, among other things, whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it'.[95]

Given the unlimited jurisdiction to review fines, the Court concluded that the review provided for by the Treaties involves review of

> 'both the law and the facts, and means that they have the power to assess the evidence, to annul the contested decision and to alter the amount of a fine. The review of legality provided for under Article 263 TFEU, supplemented by the unlimited jurisdiction in respect of the amount of the fine, provided for under Article 31 of Regulation No 1/2003, is not therefore contrary to the requirements of the principle of effective judicial protection in Article 47 of the Charter.'[96]

The ECJ thus sent a clear message in this case; that the GC must engage with the Commission's 'complex economic assessments'. This suggests that even though there may be a disconnect between the type of review that the GC states it does and that which it *actually* does, what is decisive is whether the judicial body in fact exercises full jurisdiction. Not all agree, however, that the review conducted by the GC is always sufficient intense to meet this standard. Further, even if it is correct that it does or will in the future, then it might be better if this was explicitly acknolwedged as there is clearly no room for deference to administrative discretion and the manifest error test where the court is reviewing infringement decisions falling within the 'criminal' sphere.

The ECJ[97] also receives cases from national courts. Article 267 TFEU provides a procedure whereby a national court or tribunal may (and in some circumstances must)

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92 See eg, Case M.2416, annulled on appeal, Case T-5/02, *Tetra Laval v Commission* [2002] ECR II-4381, *aff'd*, Case C‑12/03 P, *Commission* v. *Tetra Laval* [2005] ECR I‑987.

93 Case C-272/09 P, *KME* n 54.

94 'The principle of effective judicial protection is a general principle of European Union law to which expression is given by Article 47 of the Charter,' ibid, para 92.

95 ibid, para 94.

96 ibid, para 106.

97 TFEU, Art 256.

request the ECJ to give a preliminary ruling on a question on the interpretation or validity of EU law where a decision on the question is necessary to enable that court or tribunal to give judgment (and final courts must refer). This procedure, including in the sphere of competition law, is 'essential for the preservation of the [EU] character of the law established by the Treaty and has the object of ensuring that in all circumstances the law is the same in all states of the [EU]'.[98] The ECJ only gives a ruling on a reference from a body that constitutes a 'court or tribunal'.[99] It has therefore declined a reference from the Greek competition authority , although it later accepted a reference on the same issue from a Greek court.[100] The ECJ will give rulings on points of EU law which are crucial to the interpretation of domestic law in the case before the referring court.[101] This is important in competition law where many Member States (including the UK) have domestic laws which deliberately mirror the EU rules and are interpreted in line with them.

G. THE UK COMPETITION LAW RULES

The current UK competition law rules are set out in two main pieces of legislation: the Competition Act 1998 (CA98) and the Enterprise Act 2002 (EA02).[102] Core provisions are:

i. Prohibitions of anticompetitive agreements and conduct modelled on Articles 101 and 102 (the Chapter I and II prohibitions respectively, set out in the CA98);
ii. A system for market studies and market investigations (EA02);[103]
iii. A system of merger control (EA02);[104]
iv. A criminal cartel offence which applies to individuals who engage in cartel agreements (EA02).[105] An individual convicted of an offence may receive a sentence of up to five years' imprisonment and/or an unlimited fine. The original offence required that the individual had acted dishonestly. The dishonesty requirement is, however, to be removed in 2014 by the Enterprise Regulatory Reform Act 2013 (ERRA, see further below); statutory exclusions and defences will be incorporated instead. The criminal offence subsists alongside the civil regime.

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98 Case 166/73, *Rheinmühlen-Düsseldorf v Einfuhr und Vorratsstelle für Getreide und Futtermittel* [1974] ECR 33.

99 See eg Case C-54/96 *Dorsch Consult* [1997] ECR I-4961.

100 Case C-53/03, *Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) v GlaxoSmithKline* [2005] ECR I-4609 (reference refused); Case C-468-478/06, *Sot Lelos kai Sia and others EE v GlaxoSmithKline AEVE Farmakeftikon Proionton* [2008] ECR I-7139.

101 See eg, Case C-7/97, *Oscar Bronner GmbH & Co KG v Mediaprint* [1998] ECR I-7791.

102 For a detailed analysis of the UK competition law rules, see R Whish and D Bailey, *Competition Law* (6th edn, Oxford University Press, 2011), Chaps 9-11.

103 EA02, section 5 and Part 4.

104 EA02, Part 3.

105 EA02, Part 6.

The EA02 provisions, unlike the CA98 ones, are not modelled on EU law; for example, there is no direct EU equivalent provision for market investigations[106] and no EU measure deals with criminalisation of cartel activity. Further, the EA02 merger rules have procedural, jurisdictional and substantive differences to EU merger rules.

The UK competition law system will be subject to significant change when the ERRA comes into force in April 2014. In particular, the Act creates a new Competition and Markets Authority (CMA) to carry out the competition functions now performed by the Office of Fair Trading (OFT) and Competition Commission (CC) respectively. In this paper the term CMA will generally be used instead of the terms OFT and CC. The changes introduced by the ERRA are, essentially, designed to improve the effectiveness of the UK system overall. The Government has also announced separately a range of reforms to the UK's competition litigation regime, to encourage private damages' actions.

H. ENFORCEMENT OF THE UK COMPETITION LAW RULES

i. Competition Act 1998

The competition law prohibitions set out in the CA98 are enforced (i) publicly by the CMA and sector regulators (which have concurrent powers of enforcement);[107] and privately through civil litigation – either before the Competition Appeal Tribunal (CAT) or the High Court (see further below). Like the Commission, the CMA and UK sector regulators act as integrated decision-makers with power to investigate infringements of the rules, to start proceedings, to adopt decisions and to impose fines on undertakings found to be in breach. In addition, the EA02 confers power on the CMA and the sector regulators to seek a disqualification order against a director of a company that has committed a breach of the competition rules (the CA98 prohibitions and/or Articles 101 or 102) and whose conduct makes him unfit to be concerned in the management of a company.[108] The ERRA confers new powers of investigation on the CMA. Appealable decisions may be appealed on the merits to the CAT.[109]

ii. Enterprise Act 2002

The market and merger rules are enforced by the CMA or sector regulators with applications for review to the CAT.[110] Both the CMA and Serious Fraud Office (SFO) have prosecutorial powers under the criminal cartel offence.

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106 But see Reg 1/2003, n 5, Art 17.

107 Appeals on a point of law are available (with permission) first to the Court of Appeal and subsequently to the Supreme Court.

108 EA02, s 204.

109 See further, Whish and Bailey, n 102, Chap 10.

110 ibid.

II. THE RELATIONSHIP BETWEEN EU AND UK COMPETITION LAW RULES

1. AGREEMENTS AND CONDUCT

A. EU JURISDICTION: AN EFFECT ON TRADE BETWEEN MEMBER STATES

Undertakings operating in the UK must consider whether Articles 101 and 102 and/or the CA98 prohibitions may apply to their agreements or conduct. Articles 101 and 102 will only apply in so far as the agreement or conduct at issue appreciably affects trade between Member States; it must have a minimum level of cross-border effects. '[I]n order to come within the prohibition imposed by Article [101(1)], the agreement must affect trade between Member States and the free play of competition to an appreciable extent'.[111]

The question of when an agreement or conduct appreciably affects trade between Member States is thus critical: it sets out the external reach of the EU provisions and 'the boundary between the areas respectively covered by Community law and the law of the Member States.'[112] In spite of the insertion of an appreciability element in the test, the affect on trade test has been construed broadly so that it is relatively hard to find cases where agreements operating within the EU do not have an appreciable affect on trade.[113] For example, the ECJ has held that for an agreement to be capable of affecting trade between Member States, it must be possible to foresee with a: 'sufficient degree of probability, on the basis of a set of objective factors of law or of fact, that they have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way as to cause concern that they might hinder the attainment of a single market between Member States…Moreover, that influence must not be insignificant...'[114] In making the required assessment the question is whether the arrangement or practice as a whole affects trade; it is not necessary that the anti-competitive elements affect trade nor that trade is affected adversely. It could be sufficient therefore that the conduct increases the volume of trade.[115]

Some arrangements, by their very nature, reinforce the partitioning of markets on a national basis, thus impeding the economic interpenetration that the EU Treaties aim to generate.[116] For example, where national arrangements concern undertakings from

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111 Case 22/71, *Béguelin Import Co. v S.A.G.L. Import Export* [1971] ECR 949. The text of Art 101(1) does not explicitly require that the effect on competition or trade should be appreciable.

112 Case C-238/05, *Asnef-Equifax v Asociación de Usuarios de Servicios Bancarios* [2006] ECR I-1125, para 33.

113 For example, Cases C-215&216/96 *Carlo Bagnasco and Others v Banca Popolare di Novara soc coop arl* [1999] ECR I-135.

114 Case C-238/05, *Asnef-Equifax* n 112, para 34. Also Commission guidelines on the effect on trade concept contained in Articles 81 and 82 [now Articles 101 and 102] of the Treaty [2004] C 101/81.

115 Case C-238/05, *Asnef-Equifax* ibid, para 38.

116 ibid, para 37.

other Member States[117] or incorporate restraints on cross-border trade or where a dominant firm charges different prices in different Member States. This latter arrangement is likely to increase trade of the relevant product from the low-priced state to the high-priced one. Arrangements relating only to the marketing of products in a single Member State, may also affect trade between Member States.[118] For example, an agreement precluding a buyer from purchasing goods from a competing supplier may affect trade by prohibiting the buyer from contracting with competitors in other Member States. There may even be an appreciable affect on trade between Member States where an undertaking, located outside the EU, agrees to distribute products in Russia and not to import them into the EU.[119]

It has been seen that Articles 101 and 102 can be enforced by the Commission, NCAs or national courts. Further, that generally the rules are enforced publicly by the authority best placed to do so. If the Commission acts, it will apply only EU law. If an NCA acts, however, it may apply both EU and national competition law. The question of whether and when they may or must apply national rules, EU rules, or both to anti-competitive conduct and the relationship between EU and national competition law is dealt with in the sections below.

B. GENERAL: THE PRINCIPLE OF SUPREMACY AND REGULATION 1/2003

NCAs and national courts can apply Articles 101 and 102 concurrently with national competition law provisions.[120] As many national competition laws (including the prohibitions of anticompetitive agreements and conduct set out in the Competition Act 1998 (CA98)) are modelled on Articles 101/102, the risk of inconsistency between national and EU competition law is reduced. Indeed, in the UK, section 60 CA98 provides that its substantive provisions should, in so far as is possible, and taking into account any relevant differences, be interpreted consistently with corresponding EU provisions. Where, however, there is a possibility that the joint application of EU and UK competition law will not lead to the same outcome, EU makes it clear that where there is a conflict between a directly effective EU provision and national law, the former must prevail.[121] The principle of supremacy establishes that national law can be applied only in so far as its application does not 'prejudice the full and uniform application of [EU] law or the effects of measures taken or to be taken to implement it'.[122] This principle, combined with Article 3 of Regulation 1/2003,[123] means that: NCAs and national courts have an obligation to apply EU law in combination with UK law in certain circumstances; cannot apply national law to authorise conduct

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117 ibid, paras 35-6.

118 Commission guidelines on the effect on trade concept contained in Articles 81 and 82 [now Articles 101 and 102] of the Treaty [2004] OJ C101/81, para 77.

119 Case C-306/96, *Javico International and Javico v Yves Saint Laurent Parfums* [1998] ECR I-1983.

120 Case 14/68, *Walt Wilhelm v Bundeskartellamt* [1969] ECR 1.

121 Case 6/64, *Costa v ENEL* [1964] ECR 585, 593–4, 456.

122 Case 14/68, *Walt Wilhelm* n 120, para 9.

123 [2003] OJ L1/1.

prohibited by EU law; and can only apply national competition law more strictly in certain specified circumstances.

i. Obligation to apply EU Law: Regulation 1/2003, Article 3(1)

Where an NCA, or national court, applies 'national competition law' to conduct which constitutes an agreement etc caught by Article 101 or an abuse prohibited by Article 102, which affects trade between Member States, Article 3(1) of Regulation 1/2003 requires that it shall also apply Article 101 or Article 102 (Regulation 1/2003, article 3(1)). When applying Articles 101 and 102, an NCA, or national court, must interpret those provisions in accordance with that adopted by the EU Courts and respect the principle of primacy of EU law. Cooperation within the ECN is designed to ensure consistency in interpretation by the competition authorities and Article 267 TFEU provides the mechanism for national courts or tribunals (but not national competition authorities) to refer questions on the interpretation of EU law to the ECJ, see section I.2.F.v above.

Article 3(1) does not apply: (i) where the national law is not national competition law (see iv below); (ii) where the agreement or conduct does not affect trade between Member States (see II.1.A above). Further, national competition laws may be applied more strictly than EU law to unilateral conduct which does not constitute an abuse of a dominant position (see further iii below).

ii. No authorisation under national law of conduct which is prohibited by EU law

Neither an NCA nor a national court can authorise an agreement or conduct prohibited by EU law under national competition law or under any other provision of national law or according to a national act, see *Walt Wilhelm v Bundeskartellamt*.[124] Indeed, national courts and competition authorities owe a duty of sincere cooperation to the EU[125] and are required *not* to apply provisions of national law which contravene EU law.[126] In *CIF*,[127] for example, the ECJ stressed that the primacy of EU law required any provision of national law which contravenes an EU rule to be disapplied and that the duty applied to all organs of the State, including administrative authorities.[128] It made no difference that the undertakings themselves could not be held accountable for infringements of Articles 101 or 102 required by national law. The obligations of

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124 Case 14/68, *Walt Wilhelm* n 120.

125 See TEU, Art 4(3) which provides that the Union and Member States are to assist each other in carrying out tasks flowing from the Treaties and that Member States 'shall take any appropriate measure . . . to ensure fulfilment of the obligations . . .' and 'shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives'.

126 See also Case C-453/99, *Courage Ltd* n 83 and Case C-198/01, *Consorzio Industrie Fiammiferi (CIF) v Autorità Garante della Concorrenza e del Mercato* [2003] ECR I-8055 (a national authority is duty bound to disapply national legislation which violates EU law).

127 Case C-198/01, ibid.

128 ibid, paras 48–50.

the Member State were distinct and an NCA remained duty bound to disapply the national legislation.[129]

Further, the fact that conduct in breach of EU law may have been authorised at the national level (for example by sector-specific legislation, competition[130] or other national law) does not necessarily provide a defence to an undertaking that has engaged in conduct contrary to Articles 101 or 102. Articles 101 and 102 apply to conduct attributable to an undertaking on its own initiative and will only *not* apply if the anticompetitive conduct is required of the undertaking by national legislation or if national legislation creates a legal framework which eliminates any possibility of competitive activity. Thus in both *Deutsche Telekom*[131] and *Telefónica*[132] the EU Courts clarified that an undertaking infringed Article 102 when applying a pricing policy which constituted an abusive 'margin squeeze' even though its prices had been approved by an NRA.[133] The regulatory approval does not remove liability for infringing the competition rules unless the restrictive effects of the undertaking's conduct are caused wholly by the national law and the undertaking has no room for manoeuvre;[134]

iii. Ability to apply national law more strictly than EU competition law (to prohibit conduct not prohibited under EU law)

Article 3(2) of Regulation 1/2003 deals with the question of whether national competition law can be applied more strictly than EU law. It provides that:[135]

- if an agreement is authorised by Article 101, either because it does not restrict competition within the meaning of Article 101(1), it fulfils the criteria of Article 101(3), or satisfies the conditions of a block exemption, it cannot be prohibited by national compettition law (national competition law *cannot* be applied more strictly);
- national authorities are (curently) free to apply national competition laws which are stricter than Article 102 to unilateral conduct (for example, provisions regulating abuse of superior bargaining power or economic

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129 ibid, para 51. Generally such a step cannot expose the undertakings to sanctions in respect of actions taken before the disapplication, see ibid, paras 52–55.

130 See Case C-681/11, *Bundeswettbewerbsbehörde v Schenker* n 67.

131 Case C-280/08 P, *Deutsche Telekom* n 33, paras 80-85 and 91. If national law merely encourages or makes it easier for undertakings to engage in autonomous anti-competitive conduct, those undertakings remain subject to Articles 101–102, see, eg Case C-198/01, *CIF* n 126, para 56.

132 Case T-336/07, *Telefónica and Telefónica de España v European Commission*, [2012] ECR I-000, 29 March 2012, on appeal Case C-295/12 P, judgment pending. Where the restriction of competition originates solely in the national law, the restriction of competition is not attributable to the autonomous conduct of the firms, see Cases T-191, 212–214/98, *Atlantic Container Line v Commission* [2003] ECR II-3275, para1130 and Cases C-94/04 and 202/04, *Cipolla v Fazari* [2006] ECR I-11421.

133 Case C-280/08 P, *Deutsche Telekom* n 33, para 92.

134 ibid, para 80-89.

135 Reg 1/2003, n 5, recital 8.

dependence. This provision reflects the diversity of regulatory standards on unilateral conduct that exist in the Member States). Member States may therefore prohibit or impose sanctions on unilateral conduct engaged in by undertakings which does not constitute an abuse of a dominant position.[136] The Commission is, however, concerned about the diverging standards that this provision allows and as to whether it fragments business strategies that are typically formulated on a pan-European or global basis. It is thus considering whether further harmonisation is required in this area.[137]

iv. National merger control rules or national legislation which protects other legitimate interests

Neither Article 3(1), nor Article 3(2), apply to national law which is not national competition law, or where the authority wishes to apply:[138]

a. national merger control rules; or
b. national legislation, which protects other legitimate interests (other than the protection of competition on the market - the objective of Articles 101 and 102) provided that such legislation is compatible with general principles and other provisions of EU law.[139] A Member State can therefore apply legislation, for example, intended to combat unfair trading practices or perhaps consumer laws without having to apply Articles 101 and/or 102 and even if they apply more strictly than Articles 101 and/or 102.

C. ENFORCEMENT BY NCAS

i. General

NCAs must comply with the principles and obligations set out in B above. It has been seen in section I.2.F above that: when applying EU competition law, the Commission and NCAs act in close cooperation and must inform each other when they open cases (Reg 1/2003, art 11); provisions are in place to deal with case allocation (with the objective of avoiding multiple proceedings); and that Article 11(6) of Regulation 1/2003 provides that if the Commission initiates proceedings in a case, the NCA cannot apply Articles 101 and 102. Because each NCA has an obligation to apply EU law when applying national competition law, the combination of Articles 11(6) and 3(1) of Regulation 1/2003 means that NCAs are *also* deprived of their right to apply national competition law to conduct which affects trade between Member States and, in circumstances in which the Commission has initiated proceedings.[140] An NCA's jurisdiction to apply EU and domestic law only revives once the Commission has

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136 See further II.1.C below.

137 See Report on the function of Regulation 1/2003 and accompanying Commission Staff Working Paper (2009).

138 Reg 1/2003, n 5, Art 3(3).

139 ibid, recital 9.

140 Case C-17/10, *Toshiba Corp v Czech Competition Authority* 14 February 2012, paras 74-78

concluded proceedings. If an NCA intervenes after the Commission, however, they cannot contradict a previous decision of the Commission.[141]

This means that if the Commission initiates proceedings in a given case an NCA can act only if:

- The application of national competition law is in relation to a period before that Member State acceded to the EU;[142]
- The NCA wishes to apply stricter national competition law which sanctions unilateral conduct;[143]
- The NCA wishes to apply national merger control rules (in the UK set out in the EA02) to a merger or joint venture (which is not a concentration with an EU dimension or which has an EU dimension but has been referred back to the NCA, see further section II.3 below);
- The national legislation is not national competition law or is national law that pursues an objective different to that pursued by Articles 101 and 102,[144] such as regulatory rules.

ii. Implications in the UK

It is clear from the sections above that:

i. The CMA, or competent sector regulator, cannot authorise conduct under national law which is prohibited under Articles 101 or 102. Further it:

   a. Must apply Articles 101 and 102 when applying the Chapter I and II prohibitions to conduct which affects trade between Member States (Regulation 1/2003, art 3(1));
   b. Cannot apply national competition law, in particular the Chapter I CA98, to prohibit conduct which is permitted under Article 101;
   c. Can apply national competition law more strictly than Article 102 (Regulation 1/2003, art 3(2)). In the UK, however, the Chapter II prohibition is modelled on Article 102 so this result is not anticipated. The EA02[145] could, however, be used against unilateral behaviour to stricter effect than under Article 102;
   d. Cannot apply Articles 101 or 102 or any other provision of national competition law (including the CA98 prohibitions) where the Commission instigates proceedings in the case, Regulation 1/2003, Article 11(6)).

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141 ibid, para 85.

142 ibid, para 71.

143 ibid, para 76

144 ibid and Reg 1/2003, n 5, arts 3(2)(3)).

145 Or other provisions set out in legislation dealing with regulated industries, such as gas, electricity or Communications, in so far as it constitutes national competition law, see Whish and Bailey, n 102, 78.

The rules set out in a, b and d do not apply, however, where the CMA or sector regulator is applying either (a) the EA02 merger rules to the conduct at issue; or (b) law which is not national competition law but which pursues a predominantly objective to Articles 101 or 102, such as certain regulatory rules or consumer laws designed to protect vulnerable consumers.[146] The UK Government takes the view that the criminal cartel offence, which operates separately from the CA98 civil prohibition of anticompetitive conduct, also does not constitute national competition law.[147] This meant that the OFT was able to proceed with criminal proceedings in the *Marine Hoses* case, even though the Commission was conducting an investigation of the undertakings' behaviour under Article 101. If the criminal offence were to be found to constitute national competition law, the CMA would not be able to enforce it where the Commision has opened proceedings in relation to the same case (see II.1.C.i and d above).

D. NATIONAL COURTS

i. Applying and Interpreting Directly Effective EU Law

National courts are bound to apply directly effective provisions of EU law, including Articles 101 and 102 and to respect the principle of primacy of EU law. Further, when applying provisions of national competition law, they have an obligation to apply EU law (see II.1.B.i above).

National courts must interpret those provisions in accordance with the that adopted by the ECJ. Article 267 provides an important mechanism for national courts requiring clarification on the interpretation of EU law and for ensuring a uniform interpretation of EU law. The ECJ has also held that the duty of cooperation requires the Commission to assist national courts in their application of EU law and vice versa.[148] Both Regulation 1/2003 itself and the Commission's Notice on Cooperation between the Commission and the National Courts explain how such cooperation may manifest itself:

- Article 15 of Regulation 1/2003 envisages that the Commission should act as *amicus curiae* to the national courts. Not only does it provide that the national courts might request the Commission to provide information or an opinion on the application of the EU competition rules,[149] but it provides that the Commission may, where 'the coherent application of Article [101] or Article [102] so requires', submit written observations to the national courts and also,

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[146] In *Days Medical Aids Ltd v Pihsiang* [2004] EWHC 44, the High Court suggested that the restraint of trade doctrine does not predominantly pursue an objective different from Arts 101/102, so it could not be applied by a national court to invalidate an agreement that did not infringe Art 101.

[147] On this point, see *IB v The Queen* [2009] EWCA Crim 2575. One of the reasons for initially incorporating the dishonesty requirement into the offence was specifically to distinguish it from the civil prohibitions.

[148] See eg, Case 234/89, *Delimitis v Henninger Bräu* [1991] ECR I-935, para 53.

[149] Cooperation Notice, n 75, paras 22–33, 29.

with their permission, make oral observations.[150] Any opinion so provided is published by the Commission; it does not have binding effect on the courts (although it may have persuasive impact).[151] The procedural framework, dealing with how the submissions should be provided, is governed by national law.

- Regulation 1/2003 also provides that national courts must provide the Commission and NCAs with the documents necessary for preparing written or oral observations to the courts, and that Member States must forward to the Commission 'a copy of any written judgment of national courts deciding on the application of Articles [101] or Article [102]' without delay.[152] The Commission publishes these judgments on its website according to the Member State of origin.[153]

ii. Duty to Disapply provisions of national law which contravene EU law

A national court is bound to disapply any provision of national law which authorises conduct which is prohibited by Articles 101 and 102 (see II.1.B above).

iii. Concurrent Application: Duty not to take decisions contrary to that of the Commission

Article 11(6), which relieves NCAs of their competence to apply Articles 101 and 102 following initiation of proceedings by the Commission, does not apply to national courts. The ECJ has held, however, that the duty of cooperation set out in EU law requires a national court to follow a Commission decision dealing with the same parties and the same agreement in the same Member State.[154] Further, in order to ensure a uniform application of Articles 101 and 102, Article 16 of Regulation 1/2003 provides that the national courts must not adopt decisions contrary to a previous Commission decision and must avoid giving decisions that would conflict with a decision contemplated by the Commission.[155] Although Regulation 1/2003 does not deal with the impact of decisions of NCAs within the European Competition Network on national courts, the Commission has proposed that their decisions should also be given similar effect.[156] Consequently:

- Where the Commission has initiated proceedings but not determined a case, a national court must not adopt a decision which will conflict with that which

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150 Reg 1/2003, n 5, Art 15(3) (NCAs are also entitled to submit written observations to the national courts of their Member State and oral observations with permission).

151 See http://ec.europa.eu/competition/court/antitrust_amicus_curiae.html

152 art 15(2).

153 See http://ec.europa.eu/competition/elojade/antitrust/nationalcourts/.

154 See eg,Case C-344/98, *Masterfoods v HB Ice Cream Ltd* [2000] ECR I-11369 and Case 234/89, *Delimitis* n 148.

155 See also Cooperation Notice, n 75, paras 11–13.

156 Proposal for a directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provision of the Member States and the European Union COM(2013) 404 final, art. 9.

will be adopted by the Commission. The Commission will provide the national court with information as to whether it has initiated proceedings, the progress of proceedings, and the likelihood of a decision. Unless the national court cannot doubt the Commission's contemplated decision or the Commission has already decided on a similar case, it should ordinarily stay the proceedings before it.[157] Where this occurs the Commission will endeavour to give the case priority;

- Where the Commission has already decided on the case, the Commission's decision is binding on the national court, without prejudice to the interpretation of EU law by the ECJ.[158] If the national court does not agree with the decision of the Commission it must either await the outcome of an appeal, if any, from its decision, or refer the question to the ECJ for a preliminary ruling;[159]
- Where the national court does stay proceedings in the context of parallel or consecutive proceedings, it should consider whether it should impose interim measures in order to safeguard the interests of the parties involved.[160]

In *Inntrepreneur Pub Company v Crehan*,[161] the House of Lords (now the Supreme Court in the UK) held that the duty of sincere cooperation did not require the English court to accept the factual basis of a decision reached by an EU institution in a similar case but which was arose between different parties in respect of a different subject matter. A conflict would only exist when agreements, decisions, or practices ruled on by the national court had been, or was about to be, the subject of a Commission decision but not where a Commission decision related to other agreements, decisions, or practices in the same market. In the latter situation, the Supreme Court took the view that judges are bound to consider the factual evidence presented; otherwise there would be an abdication of the judicial function.

iv. The principle of national procedural autonomy and the principles of equivalence and effectiveness

Where an individual seeks to vindicate or protect his EU rights before a national court, the general principle is that of 'national procedural autonomy'—national law sets out the rules governing proceedings: 'in the absence of [EU] rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of rights which citizens have from the direct effect of Community law'.[162] National rules must not, however:

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157 See eg,Case 234/89, *Delimitis* n 148, paras 43–55.

158 Case 314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199, paras 12–20.

159 ibid, para 12.

160 Case C-344/98, *Masterfoods* n 154, para 58.

161 [2006] UKHL 38.

162 Case 33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989.

a. be less favourable than those relating to similar claims of a domestic nature (the principle of equivalence); and
b. make it virtually impossible or excessively difficult to exercise the right that the national courts are obliged to protect (the principle of effectiveness).

The principle of effectiveness, in particular, imposes an important inhibition on the free application of the national rules.

v. Remedies to guarantee real and effective judicial protection of EU rights

The duty of sincere cooperation imposed on Member States[163] requires that remedies granted by national courts must be adequate and must guarantee real and *effective* judicial protection for EU rights.[164] Although this obligation may leave a national court freedom to determine how best to protect those rights,[165] in some cases it may require the national court to grant one of two or more possible remedies[166] or even a specific remedy to rectify a specific wrong.[167] National courts are not required to grant *new* remedies,[168] but may have to be adapt or extend national rules to ensure that a remedy is available where it is required by EU law. In the competition law context, it is established that national courts must ensure that:

- Provisions in an agreement that contravene Article 101 (and it seems Article 102) are void and unenforceable;
- Full compensation, must, in principle, be available to those that have suffered loss in consequence of a breach of Article 101 or 102;
- Interim relief must be available where necessary to protect putative EU rights.

Enforceability of Prohibited Agreements

Individual *clauses* in the agreement affected by the Article 101(1) prohibition are void.[169] The agreement as a whole is void only where those clauses are not severable from the remaining terms of the agreement.[170] In *Manfredi v Lloyd Adriatico Assicurazioni SpA* the ECJ clarified that the invalidity of the agreement (or affected

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163 See n 125.

164 See Case 14/83, *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891, especially para 23 and Case 33/76, *Rewe-Zentralfinanz* n 162, para 5.

165 Case 34/67, *Lück v Hauptzollamt Köln* [1968] ECR 245.

166 See Case C-271/91, *Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching) (No. 2)* [1993] ECR I-4367.

167 See eg,Case 199/82, *Ammistrazione delle Finanze dello Stato v San Giorgio SpA* [1983] ECR 3595 (the applicant's right to restitution is a 'consequence of and an adjunct to' the rights conferred on that individual by EU law).

168 Case 158/80, *Rewe-Handelsgesellschaft Nord mbH v Hauptzollamt Kiel* [1981] ECR 1805.

169 Case 56/65, *Société La Technique Minière* n 6, 250.

170 ibid; Case 319/82, *Société de Vente de Ciments et Bétons de l'Est SA v Kerpen & Kerpen GmbH & Co KG* [1983] ECR 4173.

clauses) is absolute—the agreement has no effect as between the contracting parties and cannot be invoked against third parties.[171] Although Article 102 contains no declaration of nullity equivalent to that set out in Article 101, it is to be expected that Article 102 renders a contract, or severable terms of a contract, affected by its prohibition void[172] or, at the very least, unenforceable in the same way as Article 101.[173]

An EU Right to Damages

The ECJ's ruling in *Courage v Crehan*[174] makes it clear that, whatever the position in national law, there must, in principle, be a right to damages to compensate breaches of both Article 101 and Article 102.[175] In the absence of EU harmonising measures, it is for national rules, subject to the principles of equivalence and effectiveness, to set out the rules governing recovery. The ECJ reiterated this view in *Manfredi v Lloyd Adriatico Assicurazioni SpA*[176] where it stated that the practical effect of the Article 101(1) prohibition would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition. 'It follows that any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article [101].'[177] In this case, the Court was also asked whether Article 101 had to be interpreted as requiring national courts to award 'punitive' damages, greater than the advantage obtained by the offending operator, thereby deterring the adoption of prohibited agreements.[178] The ECJ stressed that the right to claim damages was designed to strengthen the working of the EU competition rules and to discourage prohibited agreements but that the question of whether to award punitive damages was, in the absence of EU rules governing the matter, for the domestic legal system of each Member State to determine, provided that the principles of equivalence and effectiveness are observed. Thus:

(1) It must be possible to award punitive damages if such damages may be awarded pursuant to similar actions founded on domestic law. However, EU law did not prevent national courts from taking steps to ensure that protection of EU rights does not entail unjust enrichment of those who enjoy them; and

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171 See Cases C-295–298/04, [2006] ECR I-6619, para 57.

172 See eg, the view of the Swedish Court of Appeal, *Scandinavian Airlines System (SAS) v Swedish Board of Aviation* (unreported).

173 See eg,*Gibbs Mew plc v Gemmell* [1999] 1 EGLR 43.

174 Case C-453/99, n 83.

175 Although the Court did not specifically deal with Art 102 it referred to the need to compensate those who have suffered loss caused to them by a contract *or* by conduct liable to restrict or distort competition.

176 Case C-295–298/04, [2006] ECR I-6619, para 60.

177 ibid, para 61.

178 ibid, paras 83–100.

(2) The right to seek compensation must include compensation not only for actual loss but also for loss of profit plus interest.

The question of how national rules must be applied and developed to comply with the requirements of EU law has been a matter of some debate. In particular, an important issue arising and affecting the answer to this question is how the principle of effectiveness stressed in the ECJ's judgments is to be interpreted and, in particular, whether it suggests that the principal purpose of private enforcement is the attainment of corrective justice—with deterrence operating merely as a socially beneficial by-product of such actions—or whether private enforcement is simply a tool to increase enforcement and deter violations (that is, whether the primary function of the private action is seen to be one of compensation or deterrence).

vi. National defences and procedural limitations to the claim apply insofar as those rules comply with the principles of equivalence and effectiveness (the *acquis communautaire*)

Any limitations on the right to an effective remedy must comply with the principles of equivalence and effectiveness. A national court must therefore set aside any procedural or substantive law which does not apply with the principles of equivalence or effectiveness. For example:

- The ECJ held in *Bundeswettbewerbsbehörde v Donau Chemie*,[179] that an Austrian law which prohibited disclosure to third parties of court files on public law competition proceedings, unless all parties to the proceedings agreed, was not compatible with the principle of effectiveness and so conflicted with EU law. '[I]n competition law. . . any rule that is rigid, either by providing for absolute refusal to grant access . . . or for granting access as a matter of course . . . is liable to undermine the effective application of . . . Article 101'.[180] The ECJ thus reiterated that the national court should have the opportunity to consider the issues on a case-by-case basis weighing the competing interests;
- The ECJ held in *Crehan* that a national rule of in pari delicto, based on the illegality of the agreement, cannot operate as a general bar to claims brought between parties to a contract concluded in breach of Article 101(1). It can only do so where the claimant co-contractor can be said to bear 'significant responsibility' for the breach;[181]
- Any other national rules operating to limit or bar the claim (such as a limitation period, standing rules, or a passing-on defence) can also only be applied if compatible with the EU principles of equivalence and effectiveness. In *Manfredi v Lloyd Adriatico Assicurazioni SpA*[182] the ECJ was asked about the compatibility of a national limitation period with EU law. The relevant limitation period in that case began to run from the day on which that

[179] Case C-536/11, 6 June 2013.

[180] ibid, para 31.

[181] Case C-453/99, n 83, para 31.

[182] Case C-295–298/04, [2006] ECR I-6619.

prohibited agreement or practice was adopted. The ECJ held that such a national rule could make it practically impossible to exercise the right to seek compensation for the harm caused by that prohibited agreement or practice, particularly if that national rule also imposed a short limitation period which is not capable of being suspended. It noted that in case of continuous or repeated infringement, it was possible in these circumstances that the limitation period would expire even before the infringement is brought to an end;

- It has yet to be decided whether, for example national rules on standing and on the acceptance of a passing-on defence are likely to be compatible with EU law.

vii. Proposal for an EU Directive to facilitate damages claims

It has been seen that the current law establishes that damages must in principle be available to compensate breaches of Articles 101 and 102 but that the principle of national procedural autonomy affords national courts some latitude in dealing with such claims. This means that relevant national rules retain significant impact on the likelihood of a claim's success or failure. Because of this the Commission has been considering whether measures can or should be adopted to amend and/or harmonise national procedural and substantive rules governing damages claims, for example on costs, access to evidence, limitation periods, standing, class or representative actions, fault, and/or defences, such as the passing-on defence. The Commission take the view that further action is required to stimulate private as the system of damages for infringements of competition law of the Member States 'presents a picture of "total underdevelopment"'.[183] 'Despite some recent signs of improvement in a few Member States, to date most victims of infringements of the EU competition rules in practice do not obtain compensation for the harm suffered.'[184] Further, that the current legal framework does not properly regulate the interaction between public and private enforcement. In 2013, the Commission thus published a package of measures designed to ensure that victims of EU competition infringements can obtain full compensation, including an EU Directive designed to facilitate damage claims by the victims of antitrust violations, a recommendation of non-binding principles for collective redress mechanisms for Member States and a practical guide on the quantification of harm for damages to assist national courts. At the same time the package is designed to ensure that the interaction between public and private enforcement is optimised—and, in particular, that leniency programmes and settlement procedures utilised by the Commission in its enforcement of the rules are not compromised by private enforcement.[185] In this package the Commission makes it clear that, although it accepts that private enforcement is important to supplement public enforcement, the two enforcement mechanisms pursue different, albeit

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[183] Green Paper: Damages actions for breach of the EC antitrust rules COM/2005/0672/final, 1.2. This view was based on a study prepared for DG Comp by Ashurst on damages actions before national courts of the then 25 Member States.

[184] Proposal for a directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provision of the Member States and the European Union COM(2013) 404 final, Explanatory Memorandum, 1.2.

[185] ibid.

complementary, objectives. In particular, the proposed Directive on rules governing damages actions embraces the compensatory approach.

The Directive is designed to remove a number of practical difficulties confronted by victims of infringements of the EU antitrust rules when instigating damages claims before national courts. The Commission proposes that the Directive should set out a rebuttable presumption of harm in cartel cases (but not for other competition law infringements) - the national courts will, however, even in cartel cases, have to assess the amount of damages but the idea is that the Commission's practical guide on quantifying harm will assist national courts in this respect, and that victims should obtain full compensation for actual loss suffered and loss of profits. The Commission also proposes provisions relating to: discovery (so parties will have easier access to evidence); protection of leniency and settlement documents; joint and several liability (for any participant in an infringement except for recipients of immunity); the effect of NCA decisions (which are to constitute full proof before civil courts that an infringement occurred[186]); establishment of clear limitation periods; the legal consequences of passing on and the facilitation of settlements. These proposals are explained more fully in the Commission's Explanatory Memorandum to the proposed Directive. The proposals on Collective Redress also recommend that national rules on collective redress should adhere to a number of binding principles.

If and when the Directive is adopted, national rules and procedures will have to be adapted within two years to comply with its requirements. Until then, the rule of national procedural autonomy means that national rules will continue to govern the claims, subject, of course, to the principles of equivalence and effectiveness.

viii. Remedies which would prevent real and effective judicial protection of EU rights?

A question which has been raised before the ECJ in *Huawei Technologies v ZTE*[187] is whether the seeking of a particular remedy before a national court, in that case an injunction, might infringe Article 102, see further section I.2.E above. If the ECJ holds that the seeking of an injunction does constitute an abuse in certain circumstances, then the grant of an injunction by a national court would breach its duty of sincere cooperation[188] and obligation to guarantee real and effectve judicial protection for EU rights.[189] It appears, therefore, that the national court would be required not to apply provisions of national law which contravene EU law.[190]

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[186] This proposal is provoking considerable debate – not only is it controversial but it will be difficult to operate in practice.

[187] C-170/13 (judgment pending).

[188] See n 125.

[189] See eg, Case 14/83, *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891, especially para 23 and Case 33/76, *Rewe-Zentralfinanz* n 162, para 5

[190] See also Case C-453/99, *Courage Ltd* n 83 and Case C-198/01, *CIF* n 126 (a national authority is duty bound to disapply national legislation which violates EU law).

ix. Civil Enforcement before the UK Courts

In England and Wales, competition law actions are generally brought before the Chancery Division of the High Court. Follow-on actions (where a breach of the competition laws has been established through public enforcement by the Commission or the CMA a competent sector regulator) can also be brought before the specialist Competition Appeal Tribunal (CAT).[191] Where the Commission has previously ruled on a decision, Article 16 of Regulation 1/2003 applies (see iii above).[192] Further, the CA98[193] specifically provides for 'follow-on' claims to be brought before the CAT where a breach of Article 101 or Article 102 (or the UK domestic equivalent). Such claims may be brought both by individuals and by consumer organisations on behalf of wider groups of consumers (representative claims).[194]

The UK Government is in the process of introducing a number of other changes designed to facilitate and encourage private actions in competition law and which are expected to be in force by the end of 2014.[195] For example, it is proposed that the CAT is to be given jurisdiction over stand-alone as well as follow-on actions and cases will be able to be transferred between the CAT and High Court (and vice versa), the limitation periods applicable in each court will also be harmonised, and the Government wishes to introduce a limited opt-out collective actions regime for mass damages claims. The Government is also promoting alternative dispute resolution, with the aim of ensuring that litigation in the courts is the option of last resort

It has already been mentioned that there has been a considerable volume of antitrust litigation before the English courts: whether involving an allegation of nullity of an agreement contravening the prohibitions, actions for injunctions or actions for damages. For example:

Nullity of Agreements Contravening the Prohibitions

The fact that Article 101 has been infringed, and the agreement or clauses within it are void, has been raised as a defence in a number of cases before the English courts. Should the court find an infringement of Article 101, the sanction of nullity must be applied.[196] The question of whether the prohibited clauses can actually be severed

[191] See CA98, ss 47A and B.

[192] It is not open to a national court to find that a decision of the Commission is invalid; that can only be done by the ECJ, Case 314/85, *Foto-Frost* n 158.

[193] CA98, s 47A. Claims comprising follow-on and stand-alone elements must currently be brought before the High Court (see eg *Cooper Tire & Rubber Co v Shell Chemicals UK Ltd* [2010] EWC*A* Civ 864, The Government has proposed, however, that the CAT should also be able to hear stand-alone actions, see n 195.

[194] CA98, ss 47A&B. Representation orders may also be made by the High Court, see Civil Practice Rules, r. 19.6 (but see *Emerald Supplies Ltd v British Airways plc* [2009] EWHC 741 (Ch).

[195] These are now set out in the Consumer Rights Bill, see also BIS, *Private Actions in Competition Law: A consultation on options for reform—government response* (January 2013).

[196] See eg, *The Football Association Premier League Ltd v QC Leisure* [2008] EWHC 44 (Ch), [2008] EWHC 1411.

from the remaining provisions in the contract is, however, a matter for national law. Where the applicable law is English law the position is, broadly, that the courts will sever parts of a contract where sufficient consideration remains to support the agreement and it is possible to sever by running a blue pencil through that offending part. The courts will not make a new contract or rewrite the contract for the parties, for example, by adding or re-arranging words. Nor will a court strike out words of a contract if, in so doing, a contract of an entirely different scope or intention would be left.[197] The question of severability has arisen, for example, in a number of cases involving beer supply agreements containing a beer tie (at an exclusive commitment to purchase beer from a named supplier). In these cases the courts have had to assess whether the rules allow the severance of an invalid tie from the remainder of the agreement[198] and whether the contractual provisions prohibited by Article 101(1) are not only void but *also* illegal. [199] Although the (English) *in pari delicto* rule generally prevents a court from lending 'its aid to a man who founds his cause of action upon an immoral or illegal act',[200] that rule can only be applied in so far as it complies with the principle of effectiveness (see II.1.D.iv-vi above).

In *English Welsh & Scottish Railway Limited v E.ON UK plc*[201] the High Court of England and Wales held that the effect of a contractual provision violating Article 102,[202] is also that the offending contractual provision is illegal and void and the agreement as a whole is void if the prohibited clauses cannot be severed from the remaining terms of the agreement.

Damages Actions

One of the issues to be determined by the English courts has been what the basis of any EU competition law damages claim should be: should it be breach of statutory duty, some other tort, such as unlawful interference with trade,[203] *or* should a new tort be recognised to reflect the EU nature of the claim?[204] The consensus now is that the correct basis is breach of statutory duty, requiring the claimant to show that:

- the loss suffered is within the scope of the statute, i.e., that the statute imposes a duty for the benefit of the individual harmed;
- the statute gives rise to a civil cause of action;
- there has been a breach of statutory duty (generally liability is strict once the breach of duty is established so no proof of fault is required); and

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197 See eg, *Goldsoll v Goldman* [1914] 2 Chap. 603.

198 See eg *Inntrepreneur Estates Ltd v Mason* [1993] 2 CMLR 293, *Inntrepreneur Estates (GL) Ltd v Boyes* [1993] 2 EGLR 112, and *Trent Taverns Ltd v Sykes* [1998] EuLR 571, *aff'd* [1999] EuLR 492.

199 *Gibbs Mew plc v Gemmell* [1999] 1 EGLR 43.

200 *Holman v Johnson* (1775) 1 Cowp. 341, 343, per Lord Mansfield.

201 [2007] EWHC 599.

202 And the UK equivalent, Chapter II of the Competition Act 1998.

203 See *Barretts & Baird (Wholesale) v IPCS* [1987] IRLR 3, 6.

204 See *Application des Gaz SA v Falks Veritas Ltd* [1974] Ch 381.

- the breach has caused the loss complained of.

These four requirements have to be interpreted in such a way that liability is imposed where required by EU law. The action is thus to some extent *sui generis* since the substantive conditions of liability are dictated, partially at least, by EU, not national, law. The judgment of the ECJ in *Crehan*[205] establishes that the first two requirements are satisfied in cases involving Articles 101 and 102, as it highlights the rights conferred on the individuals by the competition rules. It will, therefore, be necessary only to establish a breach of the rules and that the breach has caused the loss complained of. Indeed, when the case of *Crehan*[206] reverted to the English High Court, Park J considered that the two questions of overriding importance were (1) whether the Inntrepreneur leases infringed Article 101; and if so (2) whether the failure of Mr Crehan's business was caused by the beer ties in the lease or other factors.

A number of both stand-alone and follow-on actions have been launched before the English courts. [207] For example, claims have been lodged on the basis of the Commission's decisions in relation to vitamins,[208] carbon and graphite electrodes,[209] synthetic butadiene rubber,[210] gas insulated switchgear,[211] methionine,[212] copper plumbing tubes,[213] and animal phosphates;[214] UK decisions on Replica Football Kits,[215] Independent Schools,[216] Genzyme,[217] Albion Waters,[218] Cardiff Bus,[219] and National Grid;[220] and the UK ORR's EW&S decision.[221] In *National Grid v ABB*,[222]

[205] Case C-453/99, n 83.

[206] *Crehan v Inntrepreneur Pub Co* [2003] EWHC 1510 (Ch).

[207] See B. Rodger, 'Why not court? A study of follow-on actions in the UK' (2013) 1 *Journal of Antitrust Enforcement* 104–131.

[208] See eg, Case 1098/5/7/08, *BCL Old Co Ltd v BASF AG* [2008] CAT 24, [2009] EWCA 434 and *Devenish Nutrition Ltd v Sanofi Aventis SA* [2008] EWCA Civ 10.

[209] Case 1077/5/7/07 *Emerson Electric Co v Morgan Crucible Company plc [2011] CAT 4*.

[210] *Cooper Tire & Rubber Co* n 193.

[211] See *National Grid Electricity Transmission plc v ABB Ltd* [2011] EWHC 1717 (Ch), [2012] EWHC 869 (Ch).

[212] See Case No 1147/5/7/09 *Moy Park Ltd v Degussa*.

[213] See Case 1194/5/7/12 *W. H. Newson Holding Ltd and others v IMI plc*.

[214] See Case 1202/5/7/12 *Moy Park Ltd v Tessenderlo Chemie NV*.

[215] This was the very first representative claim by a specified consumer body. The claim was withdrawn, however, after the proceedings were settled.

[216] The proceedings relating to independent schools were settled, Case 1108/5/7/08, *Wilson v Lancing College*.

[217] In Case 1060/5/7/06 *Healthcare at Home Ltd v Genzyme* [2006] CAT 29.

[218] See Case No 1166/5/10, *Albion Water Ltd v Dwr Cymru Cyfyngedig*, [2010] CAT 30, [2013] CAT 6.

[219] See Case 1178/5/7/11, *2 Travel Group plc (in liquidation) v Cardiff City Transport Services Ltd*, 5 July 2012 (awarding damages and exemplary damages).

[220] Cases 1198/5/7/12, *Siemens plc v National Grid plc*.

the question of access to evidence arose. The High Court requested that the Commission provide certain material to it under Article 15 of Regulation 1/2003, whilst the claimants sought disclosure from the defendants of other documents which had been held on the Commission's file, including some leniency documents. In its judgment of 4 April 2012, the High Court carried out the balancing exercise required of it, in the light of the ECJ's judgment in *Pfleiderer*,[223] when determining whether leniency material should be disclosed (accepting that although the judgment in *Pfleiderer* related to leniency documents held by an NCA the same principles applied where they were held by the Commission).

As damages must in principle be available, limitations on claims available under English law may only be imposed in so far as they comply with the principles of equivalence and effectiveness. English courts can therefore, for example, only apply the *in pari delicto* (or shared illegality) rule if the claimant bears a significant degree of responsibility for the illegality of the agreement.[224] An important issue to be decided is whether it is compatible with the principle of effectives for a national court to take account of the fact that a claimant may have 'passed on' some of the injury that it has suffered to purchasers from it.[225]

The English courts have indicated that the principle of *ne bis idem* precludes punitive damages in a follow-on action involving a prior finding of infringement by the Commission or a NCA where a fine was imposed.[226]

If the Commission's proposal for a Directive is transposed into legislation some of these issues will be resolved through the adoption of EU legislation.

Jurisdiction

The questions of which national court or courts have jurisdiction to hear an EU competition law claim is determined by the Brussels Regulation[227] which provides a broad choice of jurisdictions from which a claimant may choose when deciding where to launch his action. Questions of jurisdiction have arisen, for example, in

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221 See also Case 1106/5/7/08, *Enron Coal Services Ltd (in liquidation) v English Welsh & Scottish Railway Ltd* [2009] CAT 7, [2009] EWCA Civ 647.

222 [2011] EWHC 1717 (Ch), [2012] EWHC 869 (Ch).

223 Case C-360/09, *Pfleiderer* n 15.

224 See eg *Crehan v Inntrepreneur Pub Co* [2003] EWHC 1510 (Ch) and Case C-453/99 n 83, paras 31-34.

225 See eg,Case No 1147/5/7/09 *Moy Park Ltd v Degussa* n 212.

226 Contrast *Devenish Nutrition Ltd v Sanofi Aventis SA* [2007] EWHC 2394 (exemplary damages not available where the Commission has imposed a fine in relation to the same offence and restitutionary damages not generally available in tortious claims unless compensatory damages would be inadequate), *aff'd* [2008] EWCA Civ 10 with Case 1178/5/7/11 *2 Travel Group plc* n 219 (exemplary damages awarded).

227 See Reg 44/2001 on jurisdiction and the recognition and enforcement of judgment in civil and commercial matters [2001] OJ C189/2 (the Brussels Regulation). The Commission has published a proposal to recast the Regulation, see COM(2010) 748 final.

- *Provimi* v. *Aventis.*[228] In this case Provimi had purchased vitamins from members of the vitamin cartel across Europe. Both the Commission and the US authorities had found the companies to have committed serious violations of the competition rules. The English High Court confirmed, in the context of an interim application, that a European customer could bring a claim against a UK domiciled subsidiary (under Article 2) which had participated in the infringement—it had thus implemented the cartel and was part of the undertakings (the economic unit) to which the Commission's decision was addressed.
- *Cooper Tire & Rubber* v. *Shell Chemicals*.[229] This case, involving proceedings brought by tyre manufacturers for the recovery of damages from members of the butadiene rubber cartel raised a number of points relating to the application of the Brussels Regulation. Essentially, the claims in England were brought against a number of defendants, only two of which were domiciled in the UK. Although those two companies were not addressees of the Commission's cartel decision, the High Court dismissed an action to strike out the claim, holding that it did have jurisdiction to hear the claim against the UK domiciled companies as they had sold the cartelized products—they had thus implemented the cartel and were part of the undertakings (the economic units) to which the Commission's decision was addressed. It followed that the court also had jurisdiction to hear the claim against the defendants which were not domiciled in England—Article 6(1) of the Brussels Regulation allows claims to be grouped together when they are so closely connected that it is expedient to hear and determine them together and where necessary to avoid the risk of irreconcilable judgments resulting from separate proceedings. The Court of Appeal affirmed, stating however that if the facts established that the UK subsidiaries had no knowledge of the anti-competitive conduct of the parent, it would have to be determined whether the claimant had jurisdiction—that is, whether it was sufficient that it formed part of the same undertaking as the parent to whom the decision was addressed or whether it had to be established that it had knowledge of the infringing conduct—and/or whether a reference to the ECJ was necessary to resolve the point.

Settlement and Alternative Dispute Resolution (ADR)

It seems likely that many of the uncertain issues that exist in this area have encouraged settlement of a number of the competition claims[230] arising in private proceedings.[231] Further, procedure in the commercial courts encourages ADR as a practical means of settling claims between the parties and many commercial agreements provide for disputes to be taken to arbitration. The Government is also

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[228] [2003] EWHC 961. But see also *SanDisk Corporation v Koninklijke Philips Electronics N.V.* [2007] EWHC 332 (Ch).

[229] [2009] EWHC 2609 (Comm), [2010] EWCA Civ 864 (appeal dismissed). See also *Toshiba Carrier UK Ltd v KME Yorkshire Ltd* [2012] EWCA Civ 1190 and *Nokia v AU Optronics* [2012] EWHC 731(Ch), on appeal.

[230] See Case 1105/5/7/08 *Freightliner Ltd and Freightliner Heavy Haul Ltd v English Welsh and Scottish Railways Ltd* and Case 1008/5/7/08 *Wilson v Lancing College Ltd*.

[231] B. Rodger, 'Private Enforcement of Competition Law, The Hidden Story: Competition Litigation Settlements in the UK 2000–2005' (2008) ECLR 96–116.

taking measures to encourage settlement and ADR. Not only is it going to align the CAT rules governing formal settlement offers with those of the High Court but it is going to introduce a new opt-out collective settlement regime in the CAT. It is also proposing to enable competition authorities, when a company has been found to have infringed competition law, to certify a voluntary redress scheme.

Collective Redress

The UK Government has stated that it intends to introduce a limited form of 'opt-out' collective redress scheme for competition law claims before the CAT (allowing actions to be approved on behalf of classes of businesses or consumers). The proposals have the potential to increase significantly the volume of competition law private litigation. This proposal sits rather uneasily with the Commission's subsequent recommendations for collective redress and common European principles which, in particular recommend that collective rules governing compensatory or injunctive relief should be based on an opt-in model (to be part of the collective action, the applicant must give its express consent).

2. RULES APPLICABLE TO MEMBER STATES - ARTICLE 106

A. OVERVIEW

The Treaty contains rules which apply to the actions of organs of the Member States, in particular, when they intervene in the market through undertakings which the State controls or own or which it places in a privileged position (see also the provisions dealing with State Aid, dealt with in a separate report). It has already been seen that, under Article 4(3) TFEU, the Member States owe a duty of sincere cooperation to the EU and that this, for example, requires organs of Member States (including national courts and NCAS) to disapply rules of national law which contravene EU law.[232] It also precludes a Member State maintaining in force legislation which would deprive the competition rules of their effectiveness – for example, State action with supports or strengthens an anticompetitive agreement.[233]

Article 106(1) states that Member States shall neither enact nor maintain in force measures contrary to Treaty rules (in particular those provided in Articles 18, 101 and 102 TFEU) in relation to public undertakings or undertakings granted special or exclusive rights by it.[234] Its function is to limit the ways in which State measures, protecting certain undertakings, hinder the Treaties' operation. The provision has special relevance to the competition laws (and indeed is located in the chapter dealing with competition law), since public undertakings and undertakings granted special or exclusive rights may frequently hold a dominant position. Article 106(1) only applies, however, in so far as there is a breach of the Treaty rules.

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[232] See n 125.

[233] See Case 13/77, *INNO v ATAB* [1977] ECR 2115.

[234] See also TFEU, Art 37 which deals with state monopolies of a commercial character and provides that they must be adjusted to ensure that no discrimination exists between national of Member States with regard to the conductions under which goods are procured and marketed.

Article 106(2) can be invoked by undertakings charged with a violation of the competition law rules or a Member State charged with a violation of Article 106 in conjunction with the competition law rules. It provides a limited derogation from the Treaty rules for 'undertakings entrusted with the operation of services of general economic interest' (that is activities that need to be carried out in the public interest – such as the administration of major waterways, the operation of the electricity supply network, the basic postal service, the provision of emergency ambulance services etc) or 'having the character of a revenue producing monopoly', insofar as the conduct at issues is necessary for the carrying out of those tasks. Further, the development of trade must not be affected to such an extent as would be contrary to the interest of the EU.

Article 106(3) sets out a specific procedure for the individual enforcement of Article 106 by the Commission against Member States through the issue of decisions (which may be relied upon instead of the general enforcement provisions set out in Article 258 TFEU). As Article 106 has direct effect it can also be enforced, in combination with another directly effective provision of EU law such as Article 102, in private actions before the national courts. Article 106(3) also confers power on the Commission itself to issue directives to Member States to ensure the application of the Article. The Commission has used these powers to issue a number of decisions and directives; in the latter context, the use has sometime proved quite controversial and an issue to be decided has been when it should be able to act under Article 106(3) rather than through other specific Treaty provisions conferring power to adopt legislation in the sphere.[235]

B. IMPACT OF ARTICLE 106

Case-law under Article 106 indicates that although the mere granting of a special or exclusive right to an undertaking cannot in itself automatically lead to an infringement of Article 106,[236] a Member State may infringe it if, for example, either:

- The undertaking merely by exercising its right, cannot but help to violate Article 102 by abusing its dominant position (for example, because it is unable to meet demand);[237] or

- The rights are liable to create a situation in which the undertaking is led, or induced, to infringe Article 102 through committing abuses or the rights are liable to bring about an abuse (for example, the grant of rights create a conflict of interest which will lead the dominant firm to discriminate in favour of its own business, to charge excessive prices or to reserve to itself an ancillary activity);[238]

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235 See eg, Case C-202/88, *France v Commission* [1991] ECR I-1223.

236 But see Case C-230/91, *Corbeau* [1993] ECR I-2533 where the ECJ seems to have come close to saying that the breadth of the exclusive rights granted to the Belgian Post Office were incompatible with Article 106 read in conjunction with Article 102.

237 Case C-41/90, *Höfner* n 4.

238 See Case C-260/89, *ERT v Dimotiki* [1992] ECR I-2925.

and

- The derogation set out in Article 106(2) does not apply. This derogation is applied strictly, however, so that both the Member State conferring special or exclusive rights, and the entity entrusted with the provision of SGEI will remain subject to the Treaty rules unless compliance with them is incompatible with the discharge of the duties/ and performance of the tasks entrusted to them. The provision also requires that any restriction of competition is proportionate. In *Corbeau*, for example, the ECJ accepted that the operation of a basic postal system provision is a service of general economic interest and that, consequently, some restrictions of competition might be required to ensure that the Belgian Post Office could comply with its USO. The ECJ stressed, however, that restrictions of competition are not justifiable in relation to services dissociable from the services of general interest.

3. THE RELATIONSHIP BETWEEN EU AND UK LAW: MERGERS

A. BACKGROUND TO THE EUMR AND ALLOCATION OF JURISDICTION OVER EU MERGERS

The original EEC Treaty did not however contain any specific provision for controlling mergers. The Commission recognised early on, however, that some form of EU merger control was crucial. Although initially it utilised Articles 101 and 102 to scrutinise merger transactions where possible, the lack of a specific provision governing mergers effecting a lasting change to the structure of the market inhibited its capability to operate effective competition control.[239]

Any EU Merger Regulation had, however, to be passed unanimously by the Council.[240] Initially, a lack of consensus amongst the Member States over a number of issues led to delay in such EU merger control being adopted. Not only was there disagreement over the question of whether merger control was necessary at all and which appraisal criteria should be relevant, but jurisdiction and competence were a major issue. A number of Member States were reluctant to cede power over changes in industrial structure in their territory to the Commission. A major sticking point was therefore whether, and if so at what point, control should be relinquished by the Member States to the Commission and what the relationship between EU and national law should be.

Although a merger regulation was eventually adopted in 1989 (and came into force in 1990),[241] the question of how jurisdiction should be allocated between the Commission and the Member States was controversial during the negotiations and has remained so, being revisited on a number of occasions when the EUMR has been

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[239] It adopted its first legislative proposal for a merger control regulation in 1973.

[240] The legal basis for the EUMR is Arts 103 and 352 TFEU.

[241] Council Reg (EEC) 4064/89 of 21 Dec. 1989 on the control of concentrations between undertakings [1989] OJ L395/1.

reviewed, amended and when it was recast into the current EUMR, Regulation 139/2004.[242]

B. SCHEME OF THE EUMR

The EUMR applies to 'concentrations' with a 'Community dimension' - an EU dimension. Both terms are defined in the regulation itself. The concept of an EU dimension allocates responsibility over concentrations between the Commission and the Member States respectively and imposes an external limit of merger transactions caught within its jurisdiction. Broadly, with certain limited exceptions:

- concentrations that do not have an EU dimension are assessed under any applicable national competition legislation (no EU law applies); whilst
- concentrations with an EU dimension are assessed under the provisions of the EUMR by the Commission. In these cases, the Commission's decision under the terms of the EUMR is decisive and, as a general rule, no other rule of national or EU competition law applies. The basic scheme is, therefore, that concentrations with an EU dimension benefit from a 'one-stop shop'.

C. 'CONCENTRATIONS' AND 'EU' DIMENSION

i. Concentrations

The EUMR seeks to govern operations resulting in 'a lasting change in the control of the undertakings concerned and therefore in the structure of the market'.[243] The term concentration is more specifically defined in Article 3 of the EUMR. Essentially, a concentration occurs where two or more undertakings merge their businesses *or* where there is an acquisition of sole or joint control of the whole or part of an existing undertaking or the creation of an autonomous full-function joint venture.[244]

A concentration does not currently occur therefore unless there is an acquisition of control: in *Ryanair/Aer Lingus*,[245] for example, the Commission concluded that Ryanair's acquisition of a 25 per cent stake in Aer Lingus did *not* constitute acquisition of control. Although the Commission prohibited the proposed merger (a hostile public bid by Ryanair for the *entire* share capital of Aer Lingus), the Commission did not require Ryanair to divest this non-controlling stake it had already acquired. The GC upheld the Commission's conclusion that Ryanair's shareholding did not confer control or amount to partial implementation of a concentration.[246]

Partly as a result of this case, the Commission has been considering whether its

[242] EUMR, n 7.

[243] EUMR, n 7, recital 20.

[244] EUMR, n 7, Art 3.

[245] Case M.4439.

[246] Case T-411/07, *Aer Lingus Group v Commission* [2010] ECR II-3691. The UK authorities, however, have reviewed the transaction as the UK merger rules apply to situations where one enterprise is able to materially influence the policy of another.

inability to review acquisitions of minority shareholdings, which do not confer control under the EUMR, constitutes a serious lacuna or gap in its powers to regulate transactions which have potential to cause significant harm to competition (through unilateral or coordinated effects). It is now consulting on a proposal that it should have the option to review such transactions—structural links—under the EUMR.[247] It is also consulting on the question of whether its powers under Article 8(4) should be amended to allow it to 'require the dissolution of partially implemented transactions declared incompatible with the internal market in line with the scope of the suspension obligation . . ..'[248]

As UK authorities may apply the EA02 merger rules (or the CA98 prohibitions) to any transaction which does not constitute a concentration (and indeed it can apply the EA02 merger rules even if they apply more strictly than Articles 101 or 102 (see II.1.B.iv above)), if the EU concept of a concentration is expanded to capture acquisitions of minority interests, then the circumstances in which the UK can apply its EA02 merger rules will become more limited.

ii. EU Dimension

The EUMR aims to apply to concentrations which create significant structural changes the impact of which extend beyond the national borders of any one Member State.[249] It is concentrations with an EU dimension which fall for appraisal under the terms of the EUMR. Broadly, whether or not a merger has an EU dimension is assessed by reference to the *turnover* of the parties involved.[250] Since the notification of concentrations with an EU dimension to the Commission is compulsory, and generally means that a notification cannot be made to the competition authorities of the Member States, the jurisdictional test incorporated within the EUMR is intended to be a bright line test which can be applied relatively simply, objectively, and easily.[251]

The corollary of having a simple quantitative jurisdictional test is, amongst other things, that jurisdiction over EU mergers is not always allocated appropriately as between the Commission and the Member States. Although therefore the aim of the EUMR is to draw a clear line between mergers which are to be appraised by the Commission and those that lack an EU dimension and which can be appraised at the

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247 See IP/13/584, Commission Staff Working Document, 'Towards more effective EU merger control', Commissioner Almunia, SPEECH/12/73, 'Merger review: Past evolution and future prospects', 12 November 2012 and, eg, OFT1218 'Minority Interests in Competitors: A Research Report prepared by DotEcon Ltd' (March 2010).

248 Commission Staff Working Document, Towards more effective EU merger control, 20 June 2013, 21–22

249 EUMR, recital 8.

250 'Turnover is used as a proxy for the economic resources being combined in a concentration, and is allocated geographically in order to reflect the geographic distribution of those resources', Commission Consolidated Jurisdictional Notice [2008] OJ C95/1, para 124.

251 In some States, jurisdiction may be determined by reference to the market shares of parties, See eg,Spain, and Portugal. In these States even the question of whether the merger should be notified may be a complex one to determine.

national level by NCAs, it has been accepted that the jurisdictional test will not necessarily always ensure that the transaction is allocated to the correct competition agency for review. Consequently, the EUMR contains provisions which allow for some concentrations with an EU dimension to be referred, or partially referred, downwards to one or more NCAs and for concentrations without an EU dimension to be referred upwards from one or more NCAs to the Commission.

D. REFERRALS DOWN: EXCEPTIONS TO THE RULE THAT THE EUMR ALONE APPLES TO CONCENTRATIONS WITH AN EU DIMENSION

Concentrations with an EU dimension, or aspects of such a concentration, may be dealt with by an NCA pursuant to Article 9 or Article 21(4) of the EUMR, Article 346 TFEU, or following a reasoned submission by a party to a concentration (Article 4(4) EUMR).

i. Article 9—Distinct Markets

Article 21(3) EUMR states that the prohibition on a Member State applying its national competition legislation to a concentration with an EU dimension is 'without prejudice to any Member State's power to carry out any enquiries necessary for the application of Articles 4(4), 9(2) or after referral, pursuant to Article 9(3) first subparagraph, indent (b), or Article 9(5), to take the measures strictly necessary for the application of Article 9(8)'.

Article 9 of the EUMR was initially added because of Germany's fear that the Commission's action might be less rigorous than national merger control and that local or regional issues might not be sufficiently addressed.[252] It provides for the referral, at the request of a national authority, of a merger, or aspects of it (i.e., total or partial referrals), to that authority where the concentration threatens competition in a 'distinct' market in that authority's State. Article 9 references have always been made reasonably frequently but in 2004 its provisions were simplified to facilitate the exchange of cases between the authorities. Article 9 operates as an important corrective mechanism for reallocating appropriate cases (or aspects of them) to NCAs, for example where cases raise specific issues in a Member State[253] or regional[254] or local[255] markets.

ii. Article 4(4) Request for Referral to a National Competition Authority

Article 4(4) allows notifying parties to a concentration, instead of notifying a concentration with an EU dimension to the Commission, to make a reasoned submission that a concentration may significantly affect competition in a distinct market in a Member State and should be examined in whole or in part by that Member

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252 EUMR, Art 2 only permits the Commission to take action against concentrations which would impede competition in 'the common market or in a substantial part of it'.

253 See eg, Case M.5996, *Thomas Cook/CGL and Midland*, contrast, eg, *VEBA/VIAG*.

254 See eg, Case M.3373, *Accor/Barrière/Colony* [2004] OJ C196/8.

255 See eg, Case M.1388, *Total/PetroFina*.

State. In contrast, therefore, with an Article 9 request it is lodged by the parties *prior* to notification.

iii. Article 21(4)—Legitimate Interests

Article 21(4) recognises that there are some matters which are so sensitive to the national interest that the Member States should be entitled to retain control over them themselves. Under Article 21(4), a Member State may take steps to protect any 'legitimate interests', including public security, plurality of the media and prudential rules, which are not protected under the EUMR itself. To date Article 21(4) has always been used defensively—to enable a Member State to protect its legitimate interests by scrutinising, and, if necessary, prohibiting mergers which may raise concerns (such as plurality of the media) other than pure competition ones (even were the Commission to consider that the merger was compatible with the common market).

iv. Article 346 TFEU—Essential Interests of Security

Article 346(1)(b) TFEU provides that the Treaties shall not preclude the application by a Member State of measures 'it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material'. Recital 19 to the EUMR makes it clear that the regulation (and in particular Article 21(4)) does not affect a Member State's ability to act under this Article.

v. Breach of Article 21

The Commission has launched proceedings against Member States it considers to be violating the EUMR's exclusivity provisions,[256] for example, where Member States have reacted to fears over the security of strategic industries by prohibiting or imposing conditions on cross-border mergers with an EU dimension. The Commission opened infringement procedures against Spain for not lifting unlawful conditions imposed by the Spanish Energy Regulator on E.ON's and ENEL/Acciona's competing bids for Spanish electricity operator, Endesa, both of which had been cleared by the Commission[257] (a third bid by Gas Natural did not have an EU dimension and was cleared by the Spanish competition authorities).[258] The ECJ held that by not withdrawing conditions to the E.ON merger, Spain had failed to fulfil its

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[256] 'Our line is clear: if interference by any Member State—is not justified by a legitimate public interest, the Commission will continue to condemn such national measures': N. Kroes, Speech to the St Gallen International Competition Law Forum (11 May 2007) available at <http://ec.europa.eu/comm/competition/speeches>.

[257] Case M.4110, *E.On/Endesa* and Case M.4685, *ENEL/Acciona/Endesa*.

[258] Gas Natural's hostile bid for Endesa fell outside the Commission's jurisdiction as each of the firms concerned achieved more than two-thirds of its aggregate EU-wide turnover in one and the same Member State, EUMR Art 1(2), (3), see Case M.3986*, Gas Natural/Endesa, aff'd* Case T-41/07, *Endesa SA v Commission*) [2006] ECR II-2533.

Treaty obligations.[259]

vi. UK cases

Exceptions to the general rule that the EUMR alone applies to concentrations with an EU dimension have been relied upon by UK authorities to review concentrations, or aspects of a concentration, under UK merger rules on a number of occasions. For example, in:

- *Steetley plc/Tarmac*.[260] In this case competing bids had been made for Steetley plc by Tarmac and Redland. Only the Tarmac bid had an EU dimension and the Redland bid fell to be assessed under domestic law. The concentration between Steetley and Tarmac would have pooled the building materials activities of the undertakings. In particular, the undertakings had very high market shares for bricks and clay tiles in some regions of England. The Commission agreed that the concentration would lead to particular local problems in the market for the manufacture and sale of bricks in the North East and South West of England and in relation to the manufacture of clay tiles throughout Great Britain.[261] The Commission thus issued a decision under Article 9 EUMR referring these aspects of the merger back to the UK to be assessed under the UK merger provisions. On the same day it issued a decision finding that the remaining aspects of the concentration were compatible with the common market;
- The competing bids for VSEL plc (a builder of UK Trident submarines). In this scenario British Aerospace plc and GEC notified their competing bids (which amounted to concentrations) to the Commission only insofar as they related to the non-military activities of VSEL (only 2.5 per cent of the business). The UK, relying on Article 346(1)(b) TFEU, had instructed the competitors not to notify the acquisition of the military activities. The Commission cleared the non-defence activities of the undertakings and stated that it was satisfied with the measures taken by the UK under Article 346;[262]
- *Newspaper Publishing*.[263] Although the proposed acquisition of Newspaper Publishing plc (publisher of the *Independent*) by Promotora de Informaciones SA, Editoriale l'Espresson SpA, and Mirror Group Newspapers plc fell within the scope of the EUMR, the UK took steps under Article 21(4) to protect its legitimate interests, in this case the plurality of the media. The Commission cleared the merger but noted that the UK Secretary of State would also have to grant formal consent under the UK's merger rules.[264] Any measures adopted

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[259] Case C-196/07, *Commission v Spain* [2008] ECR I-41; see also Case T-65/08, *Spain v Commission*.

[260] Case M.180, [1992] OJ C50/25.

[261] The Commission also considered the fact that a competing bid was being assessed at the domestic level.

[262] See eg,Case M.528, *British Aerospace/VSEL [1994] OJ C348/6*.

[263] Case M.423.

[264] A number of States consider that media ownership may require a different approach from that ordinarily applicable in domestic competition law. At the time the UK had special rules governing

by the UK authorities had, however, to be objectively the least restrictive to achieve the end pursued (to comply with the EU principle of proportionality)'

- *Thomson CSF/Racal (II)*.[265] In this case the UK authorities also stated an intention to consider the public security aspects of a concentration impacting on 'defence electronics' markets under Article 21(4);
- *Sun Alliance/Royal Insurance*.[266] In this case the Commission accepted that the UK authorities could apply UK insurance legislation to the transaction;
- *Lyonnaise des Eaux SA/Northumbrian Water Group*.[267] In this case the Commission accepted that the regulation of the UK water industry constituted a legitimate interest within the meaning of Article 21(4) EUMR. In accepting the legitimate interests of the UK, however, the Commission held that the UK authorities should not, in their scrutiny of the concentration, take account of factors which properly fell for assessment by the Commission.

Although both Article 21(4) itself and *Lyonnaise des Eaux* make it clear that Member States may take steps to protect a 'public interest', other than those specifically referred to in that Article, a Member State must notify any such interest to the Commission.[268] In *BSCH/A.Champalimaud*,[269] the Portuguese Minister of Finance opposed a concentration with an EU dimension which would give Banco Santander Central Hispano (BSCH) joint control of a group of companies, which included several insurance companies and Portuguese banks. The Portuguese authorities had not communicated any public interest to the Commission that they considered it necessary to protect. The Commission considered that it had not been established that the measure was based on prudential rules and that neither the 'protection of national interest and strategic sectors' nor the 'violation of procedural rules' could constitute a legitimate interest within the meaning of the provision. It thus required the Republic of Portugal to suspend the measures adopted.

It has been pointed out that to date Article 21(4) has been used defensively. It is not clear whether it allows a Member State, perhaps contrary to the general rule of supremacy of EU law, to clear a merger which the Commission has prohibited under the EUMR. For example, during the 2008 financial crisis, the UK Government stepped in to support and permit a merger which did not have an EU dimension (and so fell to be assessed under UK merger rules) between Lloyds TSB and HBOS. Controversially, the Government considered that the public interest in the stability of the UK financial system outweighed the concerns of the UK's OFT that the merger might substantially lessen competition in relation to banking services and the provision of mortgages in the UK. Had the merger had an EU dimension, however,

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newspaper mergers: see ss 57–62 of the Fair Trading Act 1973. Newspaper mergers are now within the general regime for mergers (see EA02) although the Secretary of State can intervene in media cases on public interest grounds.

265 Case M.1858, IP/00/628.

266 Case M.759, [1996] OJ C225/12.

267 Case M.567, [1996] OJ C11/3.

268 Case M.1616, *BSCH/A.Champaliaud [1999] OJ C306/37*, para 27.

269 ibid. See also Case M.2054, *Secit/Holderbank/Cimpor*.

and had the Commission wanted to block the transaction, it would have been important to know if the UK could have intervened to allow the merger relying on EUMR, Article 21(4).

E. REFERRALS UP: CONCENTRATIONS WITHOUT AN EU DIMENSION

i. National Law Applies

Article 21(1) EUMR provides that the EUMR alone applies to 'concentrations' and disapplies Regulation 1/2003 and the other implementing regulations that confer power on the Commission and NCAs to implement Articles 101 and 102. Because the general rule is that the EUMR applies only to concentrations which have an EU dimension,[270] ordinarily national law *only* applies to concentrations which do not have an EU dimension.[271] There are some exceptions, however.

ii. Joint Ventures

Article 21(1) provides that there is an exception to this general position for certain full-function joint ventures.

iii. Article 22

Article 22 (known as the 'Dutch clause')[272] permits one or more Member States to request the Commission to examine any concentration that does not have an EU dimension but which affects trade between Members States and threatens to significantly affect competition within the territory of the Member State(s) making the request.[273] Although originally included to enable Member States without merger control rules to refer particularly troublesome concentrations, from a competition perspective, to the Commission, [274] nearly all Member States now have merger control rules. A Member State could, however, now make an Article 22 request where, for example, a competing bid for the target has an EU dimension which will be considered by the Commission or, critically, where the Member State considers that the case is one which is primarily of EU interest or which it could not adequately deal with under national law. In more recent years the provision has been used by Member States that do have national merger control rules but have considered that the Commission is better placed to review a particular concentration on account of its cross-border effects. *Promatech SpA/Sulzer AG*[275] was the first case of a joint referral

[270] EUMR, n 7, Art 1(1).

[271] The prohibition in EUMR, n 7, Art 21(3) on a Member State applying its national legislation on competition applies only where the concentration has an EU dimension.

[272] The clause having been inserted at the request of the Dutch.

[273] Notice on case allocation, [2005] OJ C56/2, paras 42–45.

[274] See Case M.553, *RTL/Veronica/Endemol* [1996] OJ L294/14 (upheld on appeal, Case T-221/95, *Endemol Entertainment Holding BV v Commission* [1999] ECR II-1299), Case M.784, *Kesko/Tuko [1997] OJ L174/47* (upheld on appeal Case T-22/99, *Kesko Oy v Commission* [1999] ECR II-3775), and Case M.890, *Blokker/Toys'R'Us*.

[275] Case M.2698.

to the Commission made by the authorities of Spain, Italy, the United Kingdom, Germany, France, Portugal, and Austria. The Commission opened Phase II proceedings but ultimately approved the merger, subject to divestments. A number of joint referrals are made and accepted now each year, see for example, *GEES/Unison*,[276] *GE/AGFA NDT*,[277] *Omya/Huber*,[278] *Caterpillar/MWM*,[279] and *SCJ/Sara Lee (Insecticides* and *Airfresheners)*.[280] Referrals may be likely for example in cases giving rise to serious competition concerns:

- in a market/s which is/ are wider that national in geographic scope, or where some of the potentially affected markets are wider than national, and where the main economic impact of the concentration is connected to such markets;
- in a series of national or narrower than national markets located in a number of countries of the EU, in circumstances where coherent treatment (regarding possible remedies but also, in appropriate cases, the investigative efforts as such) is considered desirable, and where the main economic impact of the concentration is connected to such markets.

The mechanics of Article 22 are such that where a request is made by one Member State, the Commission informs other competent authorities of all the Member States which have 15 working days to decide if they would like to join the initial request. If the Commission accepts the request the referring Member States retain no control over the Commission's investigation[281] and they may no longer apply their national competition rules (jurisdiction ceases). If other Member States do not join the referral however, they will remain able to scrutinise the merger. A possibility of conflicting outcomes thus arises.

iv. Article 4(5), Request for a Referral to the Commission

Article 4(5) EUMR provides a mechanism for parties to a concentration which does not have an EU dimension and which is capable of being reviewed under the national competition laws of at least three Member States, to make a reasoned submission that the Commission should examine the concentration *prior* to national notification. This procedure is terminated if one Member State disagrees, however.

III. CONCLUSIONS

Articles 101 and 102 apply to anticompetitive agreements and conduct which affect trade between Member States. They can be enforced at the EU or national level and can, and in some circumstances must, be applied by UK authorities concurrently with

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[276] Case M.2738, *GEES/Unison* (referral requests from the authorities of Germany, France, Spain, Italy, the UK, and Greece).

[277] Case M.3136, *GE/AGFA NDT*, IP/03/1666 (art 6 clearance subject to conditions and obligations).

[278] Case M.3796, IP/06/1017.

[279] Case M.6106.

[280] Cases M.5969 and M.5895.

[281] Case T-221/95, *Endemol Entertainment Holding BV v Commission* [1999] ECR II-1299, para 42.

UK competition law rules. EU law lays out a framework governing the relationship between EU and UK competition laws which has been developed and reinforced through the work of the ECN and cooperation between the Commission and NCAs and national courts and the EU courts and Commission. This framework impose limits on the extent to which the application of national competition law can diverge from EU provisions and imposes obligations and duties on NCAs and national courts when applying EU competition law and protecting rights derived from them. EU law also incorporates provisions which preclude Member States from enacting or maintaining in force measures contrary to the competition (or other Treaty rules) and/or which would deprive them of their effectiveness.

This EU structure has resulted in a relatively high degree of convergence between EU and national competition law in substantive terms and to effective administrative enforcement and judicial protection of EU rights. Member States retain considerable autonomy, however, in relation to institutional design and the procedures governing public and private enforcement of the competition rules. Nonetheless, the Commission is increasingly concerned that the divergences that exist between national provisions in this area might be affecting the effectiveness of EU competition law and its uniform and consistent application. Indeed, it has been seen that the Commission is in the process both of: (i) seeking to introduce rules designed to harmonise national rules governing damages claims; and (ii) considering whether more needs to be done to tackle divergences in Member State's rules governing unilateral conduct and public enforcement (in terms of institutional design and procedural rules). Although the work of the ECN may go some way to tackling these latter issues the Commission is reflecting on the question of whether harmonisation measures might be required.

The EUMR, in contrast, does not provide for decentralised enforcement of the EU merger rules. Rather the system operates through allocating jurisdiction over concentrations between the EU and national authorities respectively. It is only in exceptional circumstances, and subject to limits set out in EU law, that national and EU merger rules apply concurrently.

IV. FURTHER READING

A Jones and B Sufrin, *EU Competition Law: Text, Cases, and Materials* (5th edn, Oxford University Press, 2014)

I Lianos and D Geradin (eds) *Handbook on European Competition Law: Enforcement and Procedure* (Edward Elgar, 2013)

R Whish and D Bailey, *Competition Law* (6th edn, Oxford University Press, 2011)