Application of EC Competition Rules by National Courts

Under Regulation 1/2003, whenever Member States apply national competition law they must also apply Articles 81 and 82 of the EC Treaty if the agreement or conduct in question affects trade between Member States. Since the entry into force of Regulation 1/2003 on 1 May 2004, there have been some signs of increasing enforcement of Articles 81 and 82 by national courts. This article examines the application of EC competition rules by national courts primarily by looking at the procedural issues as set out in the Commission’s Notice on co-operation between the Commission and the courts of the EU member states in the application of Articles 81 and 82. For an indication of the extent to which national courts are applying EC competition rules, we also consider some published statistics.

Guidance for national courts in applying EC competition rules

The guidelines in the Commission’s Notice on co-operation between the Commission and the courts of the EU member states in the application of Articles 81 and 82 (OJ 2004 C101/54) aim to assist national courts in applying EC competition rules and indicate how the Commission intends national courts to apply EC competition rules. The national courts are bound by EC legislation and EC case law when applying Articles 81 and 82.

The Notice sets out ways in which the Commission may assist national courts in order to ensure a consistent application of EC competition law. In the application of EC competition rules, national courts must not reach a different conclusion under national competition law that would be reached if Article 81(1) or Article 81(3) were applied to an agreement. Prior to deciding whether there is in fact a breach of Article 81 or 82, the national court is expected to consider whether the issue has been the subject of official consideration by the Commission or other administrative authorities of the Community.

The same case can be considered in parallel by the Commission and the national courts but where the Commission is still to reach a decision, the national court must wait so as not to come to a decision that would conflict with a decision contemplated by the Commission. However, the national court can safely proceed to judgment where the conditions for establishing an infringement of Article 81(1) or Article 82 are manifestly not satisfied and where there is no risk of the Commission taking a different view. If the disputed activities are clearly incompatible with Article 81(1) and do not meet the exemption criteria of Article 81(3), then the national court may come to a similar decision.

In order to promote consistency, the national court is able to ask the Commission what steps it is taking if there is any legal uncertainty surrounding the case and the national court may well decide to stay proceedings pending the outcome of the Commission’s investigation. The national courts are also able to ask the Commission for its opinion on the application of the EC competition rules (although such an opinion would not bind the national court).

1 Article 6 of Regulation 1/2003 states that national courts shall have the power to apply Articles 81 and 82 of the Treaty.
2 This proceeds the previous 1997 Notice on co-operation (OJ 1997 C39/6). A 2001 ECJ case (Masterfoods Ltd v HB Ice Cream) approved the guidelines as set out in the 1997 Notice on co-operation and the guidelines in the Delimitis case [1991].
Within one month of any national court judgment which applied Article 81 or 82, the Member State is required to inform the Commission of such fact.

**Published statistics**

The Commission has only recently published a Supplement to its 2005 Annual Report on Competition Policy; this provides information regarding the application of the EC competition rules in the Member States by national courts. Article 15(2) of Regulation 1/2003 requires Member States to forward to the Commission a copy of any written judgment of national courts deciding on the application of Articles 81 or 82. The aim is that these will then be published by the Commission and appear in its Annual Reports and on the DG Competition website. Judgments are published in the original language and classified according to the Member State of origin. The summary table below at figure 1 shows what is currently available from these sources.

**Discrepancies: UK and Sweden**

There are some discrepancies between the figures for both the UK and Sweden when comparing the 2005 Report with the DG Competition website.

In relation to the UK, the DG Competition website reports three cases, including two 2004 cases which the 2005 Report does not include.

The remaining case which is listed on the DG Competition website is also mentioned in the 2005 Report but the 2005 Report lists two other cases connected to the British Horseracing Board case.

The 2005 Report also lists two cases which are not included in the DG Competition website. In these two cases, the national court found that no sufficient nexus existed between the alleged abuse and the exercise of the

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### Table: Discrepancies

<table>
<thead>
<tr>
<th>Member State</th>
<th>Number of cases reported</th>
<th>Further details regarding the cases</th>
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</thead>
<tbody>
<tr>
<td>Germany</td>
<td>29 19</td>
<td>Several of these cases related to the Motor Vehicles Block Exemption. The majority of these cases concerned Article 81.</td>
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<tr>
<td>Spain</td>
<td>26 10</td>
<td>The sizeable increase in cases is notably due to the large number of cases regarding petrol retailing.</td>
</tr>
<tr>
<td>France</td>
<td>25 13</td>
<td>The majority of these cases concerned the Motor Vehicles Block Exemption.</td>
</tr>
<tr>
<td>Netherlands</td>
<td>15 5</td>
<td>Most of the cases concern the sale of motor vehicles.</td>
</tr>
<tr>
<td>Austria</td>
<td>10 3</td>
<td>The cases cover a wide range of sectors.</td>
</tr>
<tr>
<td>Belgium</td>
<td>9 3</td>
<td>The cases cover a wide range of sectors.</td>
</tr>
<tr>
<td>UK</td>
<td>3 5</td>
<td>Four of the cases dealt with Article 82 and the remaining case dealt with Article 81 (see below for more information).</td>
</tr>
<tr>
<td>Sweden</td>
<td>3 4</td>
<td>Two cases dealt with Article 81 and the remaining cases dealt with Article 82. One case concerns the telecommunications market.</td>
</tr>
<tr>
<td>Portugal</td>
<td>2 1</td>
<td>Cases which concerned the beer sector.</td>
</tr>
<tr>
<td>Denmark</td>
<td>1 1</td>
<td>Article 82 case concerning book publishers.</td>
</tr>
</tbody>
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3 Bernard Crehan v Inntrepreneur Pub Co CPC [2004] and Unipart Group Ltd v O2 (UK) Ltd (formally BT Cellnet Ltd) and another [2004].
4 AtTheRaces and another v British Horseracing Board and another [2005].
5 BHB Enterprises plc v Victor Chandler (International) Ltd [2005] and AtTheRaces Ltd and another v British Horseracing Board Ltd and another [2005].
6 Hewlett Packard Development Company LP and others v Expansys UK Limited [2005] and Sportswear Company Spa and Four Marketing Ltd v Sarbeet Chhattaura (trading as 'GS3') and Stonestyle Ltd [2005].
IP right and therefore summary judgment was granted in one case and in the other there were sufficient grounds for striking out competition law defences.

As regards Sweden, two cases are reported in both the 2005 Report and the DG Competition website. The third case to appear on the DG Competition website has listed the parties as “Confidential” and the judgment date (23.12.2004) does not correspond to any dates in the 2005 Report, so it would appear that this case has not been reported in the 2005 Report. There are also two cases reported in the 2005 Report which the DG Competition website omits.\(^7\)

### Emerging patterns in the application of EC competition rules by national courts?

Although the effects of Regulation 1 have yet to be reflected in a large number of judgments, it can be expected that the number of reported cases will increase significantly in the years ahead. To date, it is noteworthy that a number of Member States have yet to report any cases (including large Member States such as Italy and Poland). There could be a number of explanations for this, including that cases take time to get to judgment, that the Member States are slow to report cases or that the relevant national courts are simply not considering cases raising EC competition law issues.

It is worth noting that private actions to enforce Articles 81 and 82 are relatively rare in most Member States, and many cases are settled out of court. However, the Commission has reacted to the disincentives which currently exist to bringing damages claims on the basis of Articles 81 and 82 and a Commission White Paper on private enforcement is expected to be published later this year. This is likely to lend to more frequent application of EC competition rules in national courts and therefore the number of cases reported under Article 15(2) can be expected to rise.

### Sources:

Supplement to the Report on Competition Policy, 2005

Notice on co-operation between the Commission and the courts of the EU member states in the application of Articles 81 and 82 (OJ C 101/54, 27.04.2004).

DG Competition website

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\(^{7}\) Case No 2005:7: Swedish Competition Authority v 5 petrol companies [2005] and Case No 2005:27: FAC Flygbussarna Airport Coaches AB a.O. v Swedish Competition Authority and the Civil Aviation Authority (Luftfartsverket).
Merger Control

Notifications

1. **Dow Chemical / Wolff Walsrode** – Proposed acquisition of Wolff Walsrode by Dow Deutschland Anlagengesellschaft mbH, a wholly owned subsidiary of The Dow Chemical Company. Dow is active in plastics and chemicals, agricultural sciences and hydrocarbon and energy products and services. Wolff Walsrode is active in cellulosics, fibrous and plastic casings (OJ C 112/18, 22.05.2007).

2. **Kronospan / Constantia** – Proposed acquisition of parts of Constantia Industries by Kronospan Holding GmbH, a member of the Kronospan group of companies. Both Kronospan and Constantia are engaged in the production and supply of raw particle board, coated particle board laminates and other wood based products and related products (OJ C 112/19, 22.05.2007).

3. **Simplified procedure cases**
   - ABN AMRO / OSG (OJ C 112/16, 22.05.2007).
   - PPR / PUMA (OJ C 112/17, 22.05.2007).
   - KKR / Stefano Pessina / Alliance Boots (OJ C 112/20, 22.05.2007).
   - Iberdrola / api / SER JV (OJ C 112/21, 22.05.2007).

Phase I Clearances

4. **Unconditional clearances: simplified procedure**
   - Apollo / Claire’s Stores (MEX/07/0523, 23.05.2007).
   - Gilde / Parcom / Nedschroef (MEX/07/0523, 23.05.2007).

Phase II Clearances

5. **Universal / BMG** – The Commission has approved the proposed acquisition of the music publishing business of BMG Music Publishing by US-based Universal. The Commission found that the proposed merger, as initially notified, raised serious doubts as regards adverse effects on competition in the market for music publishing rights for online applications. Music publishers exploit the copyrights of authors by granting licences to users of music, including licences for online rights. The Commission’s in-depth investigation revealed a recent shift in pricing power from the traditional collecting societies to music publishers, such as Universal. The Commission therefore had concerns that the merger would give Universal the ability and incentive to increase prices for online rights, particularly in relation to American-Anglo repertoire. In order to address the Commission’s concerns, Universal committed to divest a number of catalogues, including the EEA-activities of Zomba UK, 19 Music, 19 Songs, BBC music publishing, Rondor UK and an EEA licence for the catalogue of Zomba US. Although the competition concerns related only to online rights, for reasons of viability the commitments cover the complete range of copyrights (IP/07/695, 22.05.2007).
6. **Court of First Instance judgments in German recycling case** – The Court of First Instance has rejected the actions of Der Grüne Punkt-Duales System Deutschland (DSD) in respect of two Commission decisions in 2001, concerning an abuse of a dominant position by DSD in the market for systems for the collection and recycling of packaging waste and two obligations attached to an Article 81 exemption decision. DSD operates a countrywide system for the collection and recycling of sales packaging under the DSD trademark, known as the Green Dot. The Green Dot is licensed to manufacturers and distributors for a fee; sales packaging marked with the Green Dot logo is then collected from collection points close to private households. The waste is collected by both local waste collecting companies with which DSD has entered into long-term exclusive Service Agreements and collecting companies in competition with DSD. Following the Commission’s Article 82 decision, DSD was ordered to amend its licence fee payment system such that it no longer charged a fee for the use of the Green Dot where the take-back and recovery services were ultimately fulfilled by a competitor of DSD (IP/01/584). The CFI has upheld the reasoning of this decision and rejected all DSD’s arguments. In its Article 81 exemption decision concerning the standard Service Agreement concluded between DSD and local waste collecting companies, the Commission attached two obligations according to which DSD must limit the duration of the Service Agreement and allow competitors access to the collection infrastructure (IP/01/1279). The CFI also upheld this reasoning and dismissed all of DSD’s pleas (MEMO/07/205, 24.05.2007).

7. **Commission approves exemption from third party access for new gas pipeline** – On 22 May 2007, the European Commission announced that it has conditionally approved a derogation under Article 22 of Directive 2003/55 in relation to the “Poseidon pipeline”, a new gas pipeline that will connect Greece and Italy. The Poseidon pipeline, which is being built by Edison of Italy and DEPA of Greece, will promote more effective competition on the Italian gas market (IP/07/691, 22.05.2007).

8. **CFI case closed on Endesa deal** – The Court of First Instance has published an Order removing Iberdola’s challenge of the European Commission’s clearance of E.ON’s proposed takeover of the Spanish power firm in April 2006 (T-200/06). With Enel and Acciona having finally assumed control of Endesa, the case was deemed by the CFI to be not worth pursuing. The Commission has recently referred Spain to the ECJ for failure to comply with the Commission’s decisions requiring Spain to withdraw certain conditions concerning E.ON’s potential bid for Endesa (IP/07/427).