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By

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**Title**

**EC AND NATIONAL COMPETITION LAW FOR  
UNDERTAKINGS;  
COMPARATIVE SUBSTANTIVE LAW AND  
JURISDICTIONAL ISSUES  
(CASE STUDY UK COMPETITION LAW)**

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# Summary

The main issue in this thesis has been to analyse EC and National Competition Law for undertakings with respect to comparative substantive law and questions on jurisdiction. The choice of National Competition Law for a case study is that of the United Kingdom.

Part one of this thesis dealt with comparative substantive law on Competition between undertakings under the UK and the EC Competition Laws. Analysis presented in this paper indicate that three main issues on the law on competition between undertakings are covered in both jurisdictions; anti-competitive agreements and other concerted practices, abuse of dominant position and the control of mergers and concentrations.

Analysis also suggest here that though competition laws at both levels may have been to ensure the economic goal of competitiveness of the respective markets, national and community jurisdictions do not always have the same objectives for their competition policies. This disparity in policy goals accounts for the differences that can be found in the application of similar prohibitions on anti-competitive agreements and abuse of dominant position under national law and under EC law. Thus for example the UK Competition Law introduces such concepts as exclusions and special treatment of agreements; Concepts unknown to EC Competition Law.

Though analysis in this paper have indicated a trend at the level of domestic Competition Laws towards adopting provisions on the prohibitions similar to those in articles 81 and 82 of the EC Treaty there is no indication that harmonisation of domestic competition laws at a community level is likely. This is also because of the differences in policy considerations between the Member States on the one hand and the Community on the other.

This paper covers the analysis of the control of article 81 and 82 of the EC Treaty under the present Regulation 17 as well as analysis on the changes to be brought about by a new Regulation that will in future repeal the use of regulation 17. This new Regulation will introduce a more decentralised regime and will allow national courts to fully apply articles 81 and 82 of the EC Treaty in co-operation with the Commission. This new Regulation also wipes out the notification procedure, which existed under Regulation 17.

The analyses in this paper have indicated that Criminalisation of anti-competitive activities with regard to cartels is a radical difference between EC and UK Competition Laws. The rationale for this is to serve as a deterrent to physical persons not to get involved in such activities. If the EC is to take such an approach this author has indicated in this thesis that it will require radical reforms at the level of the EC as well as the Member States.

Under part II of this thesis the mechanism for the resolution of conflicts on jurisdiction at both levels have been analysed. With respect to the prohibitions this has been done under the present regime under Regulation 17 as well as under the future Regulation 1/20023.

In this part of the thesis principles such as those on supremacy and direct effect of Community law over national law have been used to elucidate the prevalence of Community Law over National law. Here specific examples on this supremacy at the level of competition have been presented in terms of case law, UK legislation and under the present and future Community regime on Competition have been analysed.

This thesis has illustrated that there is the possibility of overlap between EC and National Competition Law and has attempted to present the appropriate mechanism to follow under such circumstances both under the present regime and the future regime.

The co-operation mechanism for the application of similar prohibitions at both levels under the present regime, which allows for notification has been presented. However the new Regulation while repealing the notification procedure also empowers the National Courts and Competition Authorities to fully apply articles 81 and 82 of the EC Treaty. This author suggests that in future it will be advisable for undertakings who hitherto could notify agreements to the Commission and who would no longer be able to do so, can benefit from this decentralised approach to make such notifications to competent national Courts providing for notification procedures. In the case of notification made to the UK competition Authorities, it will require them to follow the procedure requiring consultation with the Commission under this new Regulation rather than that contained in the Competition Act. This according to this author may require that the UK Competition Act be modified to accommodate the changes that will be brought about by this new Regulation.

Though Community dimension on merger control is determined by the Merger Regulation, merger Control between both jurisdictions according to this thesis is rather peculiar in nature as compared to the other prohibitions. Under the EC merger control the scope of Community jurisdiction is narrowed down by exemptions based on legitimate interests of member states. Here the tendency to have similar provisions to EC merger control seems not to be the case. Rather it may seem that the reverse situation is the case. For example the existing UK law on merger control dates back to 1973, whereas that of the EC dates back to 1989 and has gone through regular amendments up to that of 1997 and will likely go through further amendments in the future. Therefore national merger control seems to be more stable than Community merger control.

In conclusion this author believes that, despite some similarities between EC and National Competition laws, the disparities in substantive law and

jurisdictional issues between both Competition Laws will continue to subsist in the near future. Appropriate mechanisms through case law and legislation have been put in place to ensure the smooth co-habitation of both jurisdictions. This notwithstanding, it will be difficult to envisage a lasting solution to the problems raised by the need for co-habitation at both levels. The reason for this is that new economic and policy realities will always necessitate regular reform in this domain. The enlargement of the European Union may become one example of change in circumstance that might necessitate radical changes in Community as well as national rules on Competition. It is also worthwhile to note that the scope of EC competition seems to be gradually eroding National Competition Laws because of its wide interpretation.

# Abbreviations

CFI; Court of First Instance

EC; European Community

ECJ; European Court of Justice

FTA; Fair Trading Act

OFT; Office of Fair Trading

SFO; Serious Fraud Office

U.K; United Kingdom

U.S; United States of America

# 1 Introduction

The paramount reason why I choose this topic is because there is no such thing as Competition Law in my Country of Nationality in particular and most parts of Africa in general. Regional integration however exists in Africa but it is not as structured as that within the European Community.

After going through this Master's Programme I can now honestly say that I have the believe that national and Regional Competition Law, as well as increased integration between regional integration units in Africa, can help to stimulate economic growth and development therein. My intention in the near future therefore is to carry out further Research work on the adaptation of EC and its Member States National Competition Laws, for African countries. For this reason I realised that an in-depth research on substantive law and jurisdictional issues between EC and National Competition Laws for undertakings will be inspirational.

The reason for choosing using UK Competition Law as the case study for National Competition Law is because I am of a Common Law background and I believe that UK Competition Law will be more convenient for me.

This thesis is going to be based on a comparative analysis between substantive European Community Competition Law and Member States Local Competition Laws on the one hand, and jurisdictional issues between these distinct jurisdictions on the other hand.

The problem oriented and precise purpose of this work will be to attempt to present in the most explicit form possible, situations where either or both EC and UK Competition Laws will be applicable to the activity of an undertaking or group of undertakings within the EC. Such activity being that which is incidental to Community and/or National Competition Law. An attempt will also be made to present solutions to jurisdictional issues in either or both situations. Because of the possibility of overlapping Competition rules between both jurisdictions, the mechanism used to avoid conflicts of jurisdiction and double sanctions on undertakings will also have to be analysed.

The fact that Competition issues fall within the ambit of Community Competence when economic activities incidental to the subject affect trade between member states This criteria is in itself not very explicit and will be another important issue to be covered by this thesis. The reason for this is because there is no clear-cut delimitation on what constitutes acts that affect trade between Member States. This ambiguous criteria determining Community competence remains susceptible to wide interpretations, which could at times be problematic. Therefore an attempt will be made in this work to clarify what this concept is all about. This will be done in comparison to Competition issues, which have a national dimension only.



The analysis in this paper will make use of Community as well as national legislation, case law and relevant literature, on the subject. It will take into account the present regime of Community Competition Law as well as reforms that have been put in place for a future decentralised regime. It will cover three main aspects on competition between undertakings: Anti-competitive agreements and other similar practices, abuse of dominant position and mergers.

Apart from this first chapter on the introduction, the body of this paper will be divided into two major parts.

Part I will deal with a background on substantive Community and National Competition Laws, while part II will deal with the resolution of conflicts on jurisdiction in Competition issues.

Part I will be divided into four chapters.

Chapter two will deal with a background on the economic analysis, which elucidate the necessity of Competition Law.

Chapter three will deal with the objectives of EC and National Competition policies. In this chapter a background on the scope of both EC and UK Competition Laws will be presented respectively. Also included in this chapter will be a puzzle concerning the necessity or not of a Community harmonisation of National Competition Laws.

Chapter four will deal with the mechanism for the implementation of Community Competition Law and will include emphasis on the procedure under the present regime as well as that under the future regime.

In chapter five the Enforcement of UK Competition Law will be covered. This will include a presentation of the competent competition authorities within the UK and the procedure for the enforcement of UK Competition Law.

Under Part II of this thesis the mechanism for the resolution of conflicts on jurisdiction that will be presented with respect to:

- i) the application of national law on Competition which may be incidental to Community Competition Law on the one hand, and
- ii) the application of exclusively Community Law on Competition by the UK Courts and Competition Authorities on the other hand.
- iii) The special approach on jurisdictional issues between EC and UK merger control will also be analysed

With respect to the first two situations cited above analysis will be based on a dual approach; first it will be based on the present regime and then later on the future Regime.

Chapter six deals with the concept on the prevalence of Community Law over national Law. This will be done using the principles of supremacy and direct effects. Application of these principles in case law in the field of Competition Law as well as their acknowledgement through subsequent Community and National Legislation in the same field will also be presented herein. The practical implication of both principles will also be analysed in this chapter.

Chapter seven will deal with the Mechanism for co-operation between Community and National Competition Authorities and Courts.

Chapter eight on its part will deal with the Impact of EC Competition Law on National Competition Law. The analysis here will deal with similar EC and UK, rules on anti-competitive agreements and similar practices, as well as those on the abuse of dominant position.

Chapter nine will be an attempt to clarify the demarcation between Community and national jurisdiction on merger control as well as the mechanism to avoid conflicting decisions.

The last chapter will be based on the conclusion of this thesis. At this level there will be an attempt to present the status quo on the main issue under investigation in this thesis and commentaries thereto. Commentaries will cover the expectations on the future regime on competition as well as the necessity for legislative reform.

In order to delimit the scope of this thesis, National Competition Law will generally be with respect to that applicable in the UK. However it will still be necessary to have Community case law relating to other National Competition Laws to elucidate Community case law on certain issues, or explanations based on other Domestic Competition Laws to elucidate other issues on Competition.

The use of the word 'National' throughout this thesis could either mean the UK or EC Member States depending on the context.

This work will be limited to Competition Law for undertakings and will have no bearing with sectoral policies of the Community, nor state measures that affect competition.

The legal method for Research that will be used to approach and solve the problems will be based on the analysis of relevant, case law as well as Community and National legislation. This Research will be Library based and will also make use of relevant material from credible web-sites on the Internet.

**PART I**  
**BACKGROUND ON COMPETITION LAW**

# 2 The Economics of Competition Law

## 2.1 The Ideal Competition Scenario

The model of perfect competition is effect an ideal situation. In practice it is impossible to for it to be achieved. However it is a good starting point for a better understanding of the concept of competition.

Within such an ideal model, it is assumed that the following situations ought to exist:

- i) Many buyers and sellers of a homogenous product;
- ii) The quantity of product bought or sold by the buyer respectively is very small;
- ii) There, should be perfect transparency and it should be easy for all market players to have relevant information on the product and
- iv) There should also be free entry and exit out of the market.

The implication of this is that the marginal cost of the product<sup>1</sup> of each market player will get to an equilibrium state with the market price of the product as market player increases his output.<sup>2</sup>

At this equilibrium state, no firm makes any financial profits or losses. If any firm makes excess profits, new entrants will be encouraged to get in and earn some of the excess profits. This will be the case until such a time that those profits could no longer be made. The free exit assumption in this case will imply that those who are making losses will leave the market.<sup>3</sup> In a perfect competition, no firm makes profits above the normal level of profit.

Monopoly is the opposite extreme of perfect competition. Here, instead of many small sellers, there is just one seller who will be able to price above the level that will exist in the case of a perfect competition.

These explanations give the detrimental aspects of both the perfect competition and monopoly models. Added to this, the monopoly model does not take account of the activities of the competitors because they are either too small, as is the case in the perfect competition model, or monopolise the

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<sup>1</sup> Cost of producing extra unit of product

<sup>2</sup> Bishop and Walker at 17

<sup>3</sup> ibid at 17-18

market as in the monopoly model. In practice however, firms do need to take into account the commercial decisions of their rivals when formulating their own commercial strategy because such decisions may affect the decisions of other players in the market. For this reason a third model on competition referred to as Effective competition, will have to come into play.

## **2.2 Effective Competition**

Effective competition is only possible when interactions between competing firms are taken into consideration. In this respect, more realistic models of competition referred to, as models of oligopolistic behaviour ought to be examined.<sup>4</sup>

### **2.2.1 The Cournot Model of oligopoly**

This model<sup>5</sup> in a nutshell assumes that each firm competes by setting their own output once so as to maximise their output, given the output of the others firms. The outcome in this case is a non co-operative Nash Equilibrium<sup>6</sup>. The Nash non-co-operative equilibrium is described as an equilibrium, which occurs when given the behaviour of all other competitors in the market, no firm wishes to change its behaviour. Each firm maximises its profit, taking as given the behaviour of all other firms. The Cournot equilibrium in the case of more than two firms presupposes that as the number of firms increase, the market price decreases, however price is always higher than marginal cost as the number of firms increase probably because firms set prices and quantities.

This model would have sounded more real if it is interpreted as firms first choosing capacity and then setting prices subject to the capacity constraint.

### **2.2.2 Bertrand Model of Oligopoly**

The assumption behind this model is a situation where for example there are just two firms in an industry, who compete by setting their prices once so as to maximise their profit for a homogeneous product and have the same marginal cost. The outcome is non-co-operative Nash equilibrium.<sup>7</sup> The practical aspect here is that each firm tends to maximise profit by lowering the prices set by the other, until one firm sets the price at the marginal cost where after it will not be profitable to reduce such a price. The result is that

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<sup>4</sup> See Bishop and Walker at 22

<sup>5</sup> *ibid* at 24

<sup>6</sup> *ibid* at 22

<sup>7</sup> *ibid*

both firms set price at marginal cost and there is allocative efficiency. This situation holds true no matter the number of firms involved in the market.

The problem with the simple Bertrand model is that it neglects the economic reality that more firms will make the market more competitive, especially where there are a number of small players. The assumption that products are homogenous is also not very true, because usually they are differentiated in one way or the other. Each differentiated product is subject to monopolistic competition and if one firm undercuts the other, the higher priced firm will still have customers even at higher prices. In such a situation, each firm sells above marginal cost and each firm makes zero profits because of the assumption that positive profits will lead to new entry, thus driving prices back to towards zero.<sup>8</sup>

## **2.3 Anti-competitive behaviour**

The fact that as per the Cournot and the Bertrand models prices could go above marginal cost, is not necessarily inconsistent with firms vigorously competing with each other. This does not however also mean that all outcomes in an oligopolistic market are as a result of effective competition. This could as well be as the result of cartel behaviour or the abuse of a significant market power or even due to the creation of a dominant position.

### **2.3.1 Cartel Behaviour**

Assuming that cartels are effective, they are anti-competitive. Because competitors collude on prices, such competitors will be selling fewer units of the product than in a situation of competition and at higher prices and therefore making higher profits.<sup>9</sup>

### **2.3.2 Abuse of market power**

This could be defined as the ability of a firm or group of firms to raise price through the restriction of output above the level that will prevail under competitive conditions and thereby to enjoy increased profits from the action.<sup>10</sup> If such a firm or group of firms abuse this potential, the result will be adverse effects on normal competition.

### **2.3.3 Mergers**

Mergers on the other hand, which are akin to the idea of fusion of, control between hitherto competitors follow a different reasoning to that on the

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<sup>8</sup> *ibid* at 26

<sup>9</sup> *ibid* at 26-27

<sup>10</sup> *ibid* at 27

abuse of market power. Here the assessment is whether the merger will create or increase market power and so allow prices to rise relative to the prevailing price level.

### **2.3.4 Establishing the Existence of Market Power**

Because it is difficult to assess whether or not a market is subject to competition especially with respect to establishing what the appropriate competitive price is, indicators on competition in the industry are used to establish whether there is competition or not. Some of these indicators include:

- i) Industry concentration,
- ii) The number of firms and
- iii) Barriers to entry.

# 3 Objectives of European and National Competition Policies

## 3.1 Basis EC Competition policy

The most logical deduction from economic analysis of competition is that it will lead to the maximisation of consumer welfare by achieving the most efficient allocation of resources and by reducing the cost as far as possible. In reality however, many different policies have been pursued in the name of competition law, many of which are not rooted in notions of consumer welfare in the technical sense at all. In some cases even, some of them may be plainly contrary to the pursuit of the objectives in the technical sense.<sup>11</sup> The result of all these is therefore inconsistency and contradiction. For this reason, a legal mechanism becomes necessary to regulate such inconsistencies within a particular jurisdiction.

As shall be indicated later in this Work, though most European Community (EC) Member States have adopted national competition laws similar in wordings to that of the EC, this does not ipso facto imply that their objectives are exactly the same. In general, Competition Law serves the following purposes:

- i) Protection of the Consumer against monopolists or anti-competitive agreements between independent firms,<sup>12</sup>
- ii) It enables the dispersal of power and the redistribution of wealth i.e., the promotion of economic equity rather than economic efficiency.<sup>13</sup>
- iii) Competition Law should also protect the smaller firms against the more powerful rivals.<sup>14</sup>
- iv) Competition Law may also be used as an instrument for the other policies as unemployment, to dampen price inflation, to control mergers as well as to control in-equality between bargaining power of contracting parties.<sup>15</sup>

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<sup>11</sup> Wish at 12-13

<sup>12</sup> See pages 13-21 of the 1989 Annual Report of the DGFT on the protection of consumers best interests, cited in Wish , footnote 16 at 13

<sup>13</sup> See Wish at 13

<sup>14</sup> *ibid* at 13. Note that it is indicated there that the approach in the U.S. is departing from the very sentimental approach to the small competitors, in contrast to the European Commission which treats the small and medium sized undertakings more seriously.

<sup>15</sup> *Ibid* at 14



### **3.1.1 The Basis of EC Competition Law between Undertakings**

EC Competition Law has broadly speaking two goals:

- The promotion of integration between Member States and
- the promotion of effective and undistorted competition within the Community.

#### **3.1.1.1 The integration perspective**

The integration motivation of EC Competition Law plays an important role in the decisions of the EC Commission as well as those of the European Court of Justice, who show great hostility towards agreements or business practices which prevent or hinder cross-border trade.<sup>16</sup>

#### **3.1.1.2 The Economic Goal**

The Economic goal of the EC Competition Law as already indicated above, is to maintain effective competition. The fact that in an oligopolistic model of competition, prices may go far above marginal cost, is not necessarily inconsistent with firms vigorously competing with each other. Nevertheless, all outcomes in an oligopolistic market are not as result of effective competition. This could as well be as a result of cartel behaviour, or as a result of abuse of market power, as indicated in chapter 1. Therefore, the pre-occupation of the EC Competition rules is to sanction such outcomes or to prevent agreements leading to the creation of economic entities that may have the potential of restricting competition. For these reason, the direct or indirect, actual or potential infringement of EC Competition rules, are sanctioned by the Commission the Court of First Instance (CFI), as well as the European Court of Justice (ECJ).<sup>17</sup>

Under article 81 of the EC Treaty,<sup>18</sup> the Commission and the EC Courts will not limit their consideration to whether existing competition will be restricted by an agreement. They will also take into account the possibility that the parties to an agreement might in the future become competitors in the particular market. Article 81(3) however spells out the exceptions to the rule under article 81(1) for situations which may lead to economic and technical progress, be beneficial to the consumers. Article 81(2) provides for the automatic nullity of such agreements, which fall under article 81(1).

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<sup>16</sup> See Case 23/67 *Brasserie de Haechte S.A v Wilkin.Janssen*, [1967] ECR 407

<sup>17</sup> See Case 56/65 *Societe Technique Miniere v Maschinenbau Ulm GmbH* [1966] ECR 235

<sup>18</sup> Treaty establishing the European Community (*Official Journal C 325 of 24 December 2002*)

Under article 82 of the EC Treaty, an in-exhaustive list of instances of abuse of dominant position within the Common Market or a substantial part of it is cited. Neither this article nor article 81 explicitly prohibit the creation or the re-enforcement of a dominant position. This has been taken care of by the Merger Regulation.<sup>19</sup>

### 3.1.2 Other policy considerations

Apart from the objective of economic integration and efficiency within the Community, there are also other economic tasks with a common policy in the field of Agriculture and Transport, the promotion of research and development and the strengthening of competitiveness among EC industries. Therefore, conflicts with the different aims may occur.<sup>20</sup> However, article 2 and 3 of the EC Treaty sets the limits of the exceptions that can be based on article 81(3). To go beyond this limit will involve the risk that a weakening of competition will result in a conflict with the objectives of the Common Market.<sup>21</sup>

Economic objectives other than the protection of competition can be found under the conditions for exemption in article 81(3) of the EC Treaty. But this does not apply to all fields that an economist will consider being “economic”, as for example the level of employment or the distribution of income. Under EC Competition policy this goals have the same status as non-economic objectives; for example, culture or the environment, which are also included in the general objectives of the Treaty and must somehow be integrated in the application and practice of Community Law.<sup>22</sup> However as Van Gerven et al<sup>23</sup> concluded in 1997, such other aims were never considered sufficiently important to out-weigh serious restraints of competition such as cartels.

## 3.2 The Scope of EC Competition Law

Article 2 of the EC Treaty includes Competition policy as part of the objectives of the Treaty. Article 3(1)(g) also establishes that that the activities of the Community include:

*“The institution of a system ensuring that competition in the Common Market is not distorted”*

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<sup>19</sup> Council Regulation 4064/89/EEC of December 21 1989 on the control of concentrations between undertakings; OJ L 180, 09/07/1997 P. 0001-0006

<sup>20</sup> Drahos at 54

<sup>21</sup> ibid

<sup>22</sup> ibid at 54

<sup>23</sup> cited ibid

Article 4 of the same Treaty on its part states that the economic policy of the Community must be conducted:

*“in accordance with the principle of a free market economy with free competition”*

In order to reach its objectives, the EC Competition rules must address four different situations:<sup>24</sup>

- i) Agreements between two or more parties whose collusion prevents access to markets or products, to the detriment of third parties or consumers and eventually leads to price increases;
- ii) Companies capitalising from dominant positions to the detriment of competitors and customers;
- iii) Effects of structural changes, which affect market conditions (mergers and acquisitions); and
- iv) State measures, which affect market conditions.<sup>25</sup>

Article 81 of the EC nullifies agreements between undertakings, which affect competition within the Community with some exceptions. Article 82 on the other hand prohibits the abuse of a dominant position which may also affect trade within the Community, but has no exemptions similar to those afforded to article 81(1) prohibitions under article 81(3). Articles 86-89 are directed towards some form of State intervention, which may affect competitive conditions.

Article 83 of the EC empowers the Community to have secondary legislation in the field of Competition. Regulation 17<sup>26</sup> is the most potent instrument empowering the European Commission to regulate Competition issues between undertakings. Under this regulation, exemptions from prohibitions can be applied for and granted by the Commission.

A new Community Regulation,<sup>27</sup> which shall replace Regulation 17 with a more decentralised approach, shall come into force by May 2004.<sup>28</sup>

Elements on the creation of, or the strengthening of a dominant position within the Community through merger acquisitions or Joint ventures have also been regulated by the Merger Regulation.<sup>29</sup>

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<sup>24</sup> Lidgard at 14

<sup>25</sup> It should be noted that Competition rules on state measures distorting competition is out of the scope of this work.

<sup>26</sup> Council Regulation 17/62/EEC of February 6 1962, First Regulation implementing articles 85(now 81) and 86(now 82) of the Treaty, OJ 1962 13/204

<sup>27</sup> Regulation (EC) 1/2003 OF 16 December 2002 on the implementation of the rules on competition laid down in articles 81 and 82 of the Treaty, Official Journal L 001, 04/01/2003 p. 0001-0025

<sup>28</sup> This new Regulation shall be analysed more detailly in subsequent sections of this work

In order for there to be a breach of Community competition rule, the breach must have a Community dimension *i.e.*, it must have effects on trade between the Member States of the Community. In STM MBU<sup>30</sup> the Court held that the Trade criterion requires a prohibition if there is the possibility that trade between Member States might be impeded. Direct or indirect, actual or potential breaches to Community competition rules are also sanctioned in a like manner.<sup>31</sup> However The fifth revision of the Commission's *de minimis* Notice<sup>32</sup> accepts horizontal collaboration up to 10% market share and vertical collaboration up to 15% market share on condition that the agreement does not contain certain blacklisted clauses such as price fixing, production restriction and market sharing stipulations. Nevertheless as per this notice, small and medium sized undertakings, which are defined as those which have fewer than 250 employees and have either an annual turnover not exceeding EUR 40 million or an annual balance sheet not exceeding EUR 27 million, are entirely outside the operation of article 81 EC Treaty.

The Merger Regulation also applies to concentrations with a “Community dimension as provided for in the Regulation:

*“For the purposes of this Regulation, a concentration has a Community dimension where,<sup>33</sup>*

*(a) the aggregate world-wide turnover of all the undertakings concerned is more than ECU 5 000 million, and*

*(b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.”*

Article 3 as amended provides that:

*“For the purposes of this Regulation, a concentration that does not meet the thresholds laid down in paragraph 2 has a Community dimension where:*

*(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than ECU 2 500 million;*

*(b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than ECU 100 million;*

*(c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than ECU 25 million; and*

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<sup>29</sup> *Supra* note 19

<sup>30</sup> Case 56/65, *La Societe Technique Miniere v Maschinenbau Ulm GMBH* 1966 ECR 235

<sup>31</sup> *ibid.*

<sup>32</sup> Commission Notice on agreements of minor importance which do not appreciably restrict competition under article 81(1) of the Treaty Establishing the European Community (*de minimis*); OJ 2001/C368/07 (First version JO 1970 C84/4)

<sup>33</sup> Article 4

*(d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 100 million; unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State*

*As per this regulation, such concentrations with a community dimension, must be notified to the Commission.”*

This crucial word “concentration” to which article 1(1) of the Merger Regulation applies is defined in article 3(1) of the same Regulation as:

- (a) the merger of two firms into a single enterprise and
- (b) The acquisition of direct or indirect control over one firm by another.

The word “concentration” which includes both concepts of Mergers and acquisitions has been elaborated further in Commission Notice on the concept of concentration.<sup>34</sup> According to this Notice, a Merger occurs when companies amalgamate into a new undertaking and both cease to exist as separate legal entities. A merger also exists when one entity is absorbed into another. An acquisition on the other hand is focusing on changes in control achieved by one or more undertakings over a formerly independent company. Also the creation of a joint venture performing on a lasting basis all the functions of an economic entity which does not give rise to the coordination of competitive behaviour of the parties amongst themselves or between them and the joint venture shall, shall constitute a concentration within the meaning of paragraph 1(b) of article 3(2) of the Merger Regulation.

Hitherto concentrative joint ventures fell under procedural rules of Merger Control and had to be notified according to the Merger rules,<sup>35</sup> while cooperative joint ventures continued to be subject to article 81 of the EC Treaty. This situation was unsatisfactory not only because this distinction is not only very complicated for firms, but also because the legal treatment of both is different. While Merger control is subject to time limits and decision applies for all times, decisions under article 81(3) can drag forever and exemptions are of a limited validity. In the 1998 Merger Regulation 4064/89 this position was changed. Now all <sup>36</sup> full function joint ventures fall under Merger Control and must be notified according to the Merger Rules.

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<sup>34</sup> Commission Notice of 2 March 1998 on the concept of concentration under Council Regulation 4064/89/EEC, OJ 1998C 66% [1998] 4 CMLR 586

<sup>35</sup> With regard to the the procedure for the notification of Mergers, see Commission Regulation 2367/90/EEC OF 25 July 1990 on the control of concentrations between undertakings (as ammended by Commission Regulation 3666/93/EEC, of 15 December 1993) OJ 1989 L 219/5, [1990] 4 cmlr 683

<sup>36</sup> See Drahos at 81

The territorial applicability of EC Competition Law is also very important. In *Wood-Pulp 1*<sup>37</sup> the ECJ held that the territorial applicability of EC Competition Law, is when any anti-competitive activity, has effects within the territory of the European Union.

### **3.3 Scope of U.K. Competition Law**

The Competition Act of 9th November 1998 is the principal instrument regulating competition within the U.K. The Enterprise Act 2003, is also another major instrument, which deals with the criminalisation of anti-competitive activities.

#### **3.3.1 Competition Act**

Under this Act, restrictive agreements and arrangements are subject to a new national prohibition, which are similar in wording to article 81 of the EC Treaty, and are referred to as the Chapter 1 prohibition. This Act repeals the 1976 Restrictive Trade Practices Act as well as the Resale Prices Act 1976.

The chapter 2 prohibition of this Act deals with the abuse of a dominant position. The monopoly provisions of the Fair Trading Act will remain in force allowing for the investigation and the remedying of ‘monopolistic practices’. The competition provisions in the 1980 Competition Act will however be repealed.

Also national merger control in the U.K. remains unaffected by the new Act and continues to be governed by the merger provisions of the Fair Trading Act (FTA) 1973. The only difference brought about by the new Act is that the functions of the Monopolies and Mergers Commission are wholly transferred to the new competition Commission that replaces it. Powers of investigation decision –making and enforcement will rest with the Office of Fair Trade (OFT). Appeals against OFT decisions will go to a new body called the Competition Commission.

The Competition Act 1998 was drafted with similar provisions to those of article 81 and 82 of the EC Treaty in order to avoid a double regulatory burden as a result of the existence of two unaligned sets of Competition rules. This however does not mean that the provisions of the EC Treaty and the Competition Act are applied in a similar manner. In fact the policy goals are different. While the EC Competition Law rules seek to improve on integration within the Community the U.K. competition Law seeks to make the UK market more competitive.

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<sup>37</sup> Joined cases 89/85, 104/85, 114/85, 116/85, 117/85, 125-129/85, *Wood-pulp Producers v EC Commission*, [1988] ECR 5193

Because of the possibility of overlap between EC and U.K. Competition Laws, there is the possibility of conflict arising as to the jurisdiction as well as the applicable law on the conflict pertaining to the Competition issue in question.

The divergent policy goals also means that there is the possibility of exemptions or exclusions from the U.K. Chapter 1 prohibition of vertical agreements and land agreements, even though such agreements fall within the ambit of equivalent EC prohibition under article 81 of the EC Treaty.

The Competition Act 1998 makes a radical departure from EC Competition Law by introducing two new concepts:

- i) 'exclusions', and
- ii) 'separate treatment'

Special protection treatment is given to certain agreements under these concepts, which will otherwise have fallen under the Chapter 1 prohibition.<sup>38</sup>

It is important to distinguish these concepts from "exemption".

- An excluded agreement is one, which is deemed not to come within the Chapter 1 Prohibition at all.
- An agreement granted special treatment is one which benefits from an order made under section 50 of the Competition Act protecting it from Chapter 1 prohibition, whether by exclusion or exemption or otherwise.
- An agreement granted exemption is one, which falls within Chapter 1 prohibition, but which has offsetting economic benefits that justify non-application of the Prohibition.<sup>39</sup>

Under section 3 of the Competition Act, read together with Schedule 1 to 4, the main types of agreements, which are, excluded from the Chapter 1 Prohibition, are:

- i) Mergers and Concentrations (including concentrative joint ventures)<sup>40</sup>;
- ii) Services of general economic interest, of the type covered by Article 86(2) of the EC Treaty<sup>41</sup>;

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<sup>38</sup> There are also exclusions from the chapter 2 prohibition, and special treatment apply to agreements under the same prohibition.

<sup>39</sup> See Drahos at 102 for these distinctions

<sup>40</sup> Schedule 1 and section 3(2)

<sup>41</sup> Schedule 3 paragraph 4

- iii) Agreements which received “section 21(1) clearance” under the Restrictive Trade Practices Act<sup>42</sup>;
- iv) Compliance with planning obligations and other legal requirements<sup>43</sup>;
- iv) Agreements relating to coal and steel would be covered by the ECSC Treaty ( European Coal and Steel Community (ECSC) Treaty 1951)<sup>44</sup>;
- v) Rules of non UK financial markets which are regulated under the European Economic Area (EEA)<sup>45</sup>;
- vi) Certain agricultural products agreements<sup>46</sup>;
- vii) Agreements which are subject to similar Competition Scrutiny under other UK Legislation<sup>47</sup>; and
- viii) Other general exclusions to be created by the Secretary of State.<sup>48</sup>

Special treatment provisions fall under Section 50 of the Act and cover vertical agreements and land agreements which will otherwise fall within Chapter 1 prohibition but are protected from this prohibition by virtue of the Special treatment. Section 50 does not itself grant special treatment, but merely empowers the Secretary of State to do so by way of a subsequent order.<sup>49</sup>

The territorial applicability of this Act with respect to the Chapter 1<sup>50</sup> prohibition is when the prohibited practice, affects trade within the U.K. The Chapter 2 prohibition also has territorial applicability when there is the abuse of a dominant position within the U.K. or any part of it<sup>51</sup>.

The criminalisation of anti-competitive acts is also an element dealt with by the U.K. Competition system, unlike that of the EC. Article 42-44 of the Competition Act provides for offences in relation to the refusal to produce documents during investigations carried out by OFT, as well as for the obstruction of justice by preventing OFT officials from entering into premises in order to carry out investigations. Anti-competitive acts criminalised by this Act also include offences such as misleading

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<sup>42</sup> Schedule 3 paragraphs 1 and 5

<sup>43</sup> *ibid*

<sup>44</sup> Schedule 3 paragraph 8

<sup>45</sup> Schedule 3 paragraph 3

<sup>46</sup> Schedule 3 paragraph 9

<sup>47</sup> Schedule 2

<sup>48</sup> See Schedules 3(3) and 4, 3 paragraph 7, 3 paragraph 6 and schedule 4

<sup>49</sup> See Drahos at 104

<sup>50</sup> Section 2(1)(a-b)

<sup>51</sup> Section 18(3)



information given to investigating authorities as well as the destruction of documents, which could have been useful for investigation.

### 3.3.2 Enterprise Act

The criminalisation of anti-competitive behaviour in the UK has been enhanced recently by the enacting of the Enterprise Act, which introduces new offences referred to as corporate offences. According to the official UK government DTI web-site<sup>52</sup> the initial Bill has finally been voted into law as the Enterprise Act and received royal assent on 7 November 2002 and the competition and consumer provisions will come into force in spring/summer 2003.

This Act, which is intended to reinforce deterrence to anti-competition behaviour<sup>53</sup>, criminalizes participation in certain forms of cartel activities within the U.K. domestic market. It also criminalizes some activities referred to as corporate offences. Misleading information given to authorities investigating such activities as well as refusal to cooperate with or obstructing the investigation process on such activities according to this Act are also to be criminalized.

Section 120 of this Act deals with corporate offences while sections 183-185 deal with cartel offences.<sup>54</sup> Section 114(2) provides for offences related to misleading information given intentionally to authorities investigating breach on competition issues or to another person knowing that the same will be given to such authorities.

Persons guilty of offences under both sub-sections 1 and 2 of section 114 shall be liable accordingly either on summary conviction to a fine not exceeding the statutory minimum, or on conviction on indictment, to a term of imprisonment not exceeding two years or to a fine or to both.

Corporate offences are considered as offences that are committed by persons corporate, with connivance consent or due to negligence on the part of a director, manager, secretary or other officer of a body corporate or person purporting to act in such capacity.<sup>55</sup> In both cases the person and the body corporate commit the offence and shall be liable to be proceeded against and punished accordingly.<sup>56</sup> The same situation applies to a body corporate managed by its members. Such members shall be liable in a similar manner

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<sup>52</sup> <http://www.oft.gov.uk/intro.htm>

<sup>53</sup> See the publication of the Office of Fair Trading on "Competition Reform" ; Regulatory impact assessment, found at <http://www.dti.gov.uk/enterpriseact/pdfs/ria-competition.pdf>

<sup>54</sup> Full text of the Act available in <http://www.publications.parliament.uk/pa/1d200102/bills/112/2002112a.pdf>

<sup>55</sup> Section 120(1)(a-b)

<sup>56</sup> *ibid* section 120 (3)(1)(1)

in the event of them being involved in corporate competition breach offences.<sup>57</sup>

Cartel offences provided for under section 183-86 of this Act are agreements between at least two undertakings to be implemented on price fixing, prevention of supply or production of products, division of the supply of products or services to customers within the UK. It also includes division of the customers within the UK for supply of products or service, or bid rigging arrangements. Under section 185, these offences under section 183 are punishable on conviction on indictment, to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both. Proceedings under section 183 may be instituted only by the director of the Serious Fraud Office (SFO), or by or with the consent of the Office of Fair Trade (OFT).

A further factor indicating the importance attached by the Enterprise Act to Cartel offences is the fact that offences under section 183 and conspiracy or attempts to commit such offences, are now included among offences under Section 2 of the Extradition Act of 1870.<sup>58</sup> The Extradition Act deals with arrangements with foreign states on extradition issues.

Section 187 deals with investigation of offences under section 183 while section 188 deals with the powers given to the authorities when conducting cartel offences. Section 189 deals with the power to enter premises under warrant. Non-collaboration with investigating authorities under the circumstances under sections 188 and 189 are punishable under section 196. This section also punishes destruction of valid documents under investigation under section 183. This punishment is for two years on conviction on indictment or to a fine or both, or on summary conviction to a fine not exceeding the statutory maximum.

In an effort to ensure that “whistle blowers” are not discouraged by criminal sanctions, the OFT will have the power to issue “no action letters” confirming to informants that they will not be prosecuted provided that they collaborate fully with investigators.<sup>59</sup>

### 3.3.2.1 Comments on the UK approach on anti-trust criminalisation

In terms of the way this Act is to criminalise hard-core cartels, it can be said that it is certainly a draconian measure and indicates the vigour with which the U.K. intends to sanction anti-trust activities within its jurisdiction.

This U.K. approach towards anti-trust criminalisation raises legal issues on:

- i) Those who are to be punished;
- ii) The nature of the punishment;

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<sup>57</sup> *ibid* section 120(3)(1)(2)

<sup>58</sup> *ibid* section 186

<sup>59</sup> See web-site *supra* note 38

- ii) The element of intention in the participation in cartel offences;
- iv) The nature of the cartel offences; and
- v) The territorial applicability of the Act.

The fact that this Act provides for criminal sanctions to executive personnel of any undertaking, which participates in cartel offences of his employer, raises the possibility of conflict of interest for such an official. This conflict will be between serving his employer and protecting himself from criminal liability. Nevertheless this situation could better serve the purpose of the criminalisation of anti-trust activities as compared to sanctions based solely on fines under the civil regime. Under the civil regime, an undertaking could anticipate the huge profits that could emanate from implementing an anti-competitive activity. This could be compared to the highest possible fines in the event of the discovery of such cartel activity. After such analysis it can then take the risk of implementing it. On the other hand according to the context under this Act, such an employee could be deterred from being involved in such a malpractice for fear of criminal liability. This notwithstanding, it might also be possible that his employers might coerce him to implement or conceive anti- competitive ideas. In such a situation the employee could be himself bent on taking the risk to preserve his lucrative job.

The nature of the punishment; which could either be on summary conviction on fines or on conviction on indictment either to fines and/or terms of imprisonment raises a problem on the discretionary powers of the judges or the jury. This problem is with respect to the mitigating circumstances, which will make it possible for the offender to have any punishment other than the maximum.

The element of intention to participate in such anti-trust activities can be implied from the wordings of section 120 of this Act. This section which contains the words “connivance” and “consent” on the part of an employee of an undertaking, is in line with the *mens rea* requirement necessary for liability in other criminal offences. If such *mens rea* to participate in a cartel offence is established, it will certainly have a positive impact on the members of the jury. On the other hand, with the use of words akin to negligence under the same section 120, it may seem that it imposes some kind of strict criminal liability on the part of an employee who is linked to a cartel activity carried out by his employer. This might seem to be the case even if he might not have intended such anti-competitive results.

The provisions of this Act seem to have established as primary requirement for liability in cartel offences, agreements or concerted practices that may yield anti-competitive effects within the U.K. Such agreements or concerted practices need not to be necessarily executed. In such a situation, the culprits

will be punished in like manner as if such measures had been implemented (successfully or not).

The territorial applicability of this Act follows the reasoning by the European Court of Justice in *Wood Pulp 1*<sup>60</sup>. U.K. courts have jurisdiction on cartel offences in so far as they produce effects within the U.K.

The 'no action letters' issued to secondary offenders in cartel activities is a welcome step towards facilitating investigations on allegations of cartel activities within the U.K. and is in line with similar leniency measures for accomplices who collaborate fully with investigators in other criminal investigations.

### **3.4 Harmonisation Puzzle between Community and Domestic Competition Laws**

As of now within the Community, there is no express legislation in the form of a Regulation or Directives intended to harmonise competition Law within the Member States . Competition legislation within the Member States solely emanates from local legislation. Community harmonisation has not yet taken place even though Competition policy is one of the paramount objectives of the Community as well as for the Member States. What is it that makes the Community legislator and the Member States indifferent to such a harmonisation, despite the fact that there is always the possibility of overlap and therefore conflict and differences between Community and Member States jurisdiction on one hand and Community and Member States Substantive law on the other?

Though there has not been such express harmonisation, recently there has however been the tendency for the reform of local competition laws within the Community to forms similar in wording to articles 81 and 82 of the EC Treaty. In other cases, interpretation of national competition law could be based on either or both EC substantive and/or case law on competition. This has not taken place as a result of any Community recommendation but as a result of the implied recognition of the need to have local competition laws similarly worded to those of the Community. The reason for this tendency, is to avoid double jeopardy on the part of local undertakings who otherwise will be faced with totally different worded text on Competition, all of which will be applicable to them.

The following examples will illustrate the relationship of local Competition law with respect to Community Law

The German Cartel Law (*Gestz Gegen Wettbewerbs Beshränkungen (GWB)*) refers to Community Competition Law as regards only one aspect;

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<sup>60</sup> Joined cases 89/65, 104/85, 114/85, 116/85, 117/85,125-129/85 of 27 September 1988  
*Wood-pulp Producers v EC Commission*

the decentralised application of Competition rules and the power to grant individual exemptions. Though this is contrary to Council Regulation 17/62, this legal basis was created in the GWB at time when the Commission was planning to give up monopoly<sup>61</sup> and the German legislator wanted to be prepared for this possible development.<sup>62</sup> The BkartA has also regularly applied EC Competition rules in the past, especially where it did not have the necessary instruments under German Law. This has been the case for example with reference to restrictive vertical distribution agreements and sector exemptions.<sup>63</sup>

Under Austrian cartel law, the supremacy of European Law, is explicitly acknowledged. Furthermore several provisions in this law state that an exemption will not apply if an agreement in question violates EC Law. This means that under Austrian Law there is a national legal duty to take article 81 of the EC Treaty into consideration in purely national proceedings.<sup>64</sup> Under Austrian Law interpretation of specific terms is often adopted from EC and German legal systems even though the legal consequences under EC and German Law are not similar to those under Austrian Cartel Law.<sup>65</sup>

The Dutch Competition Law on its part provides for exceptionally close links with EC Competition Law. It refers to European Competition Law in three ways:

- first it provides for direct and indirect links, terms, rules and case law,
- secondly it has incorporated EC group exemptions and
- thirdly it provides for the decentralised application of article 81(1) and 82 of the EC Treaty to be carried out by the Dutch Competition Authority.<sup>66</sup>

Despite this tendency of national competition laws converging towards that of the EC; especially under the last two examples on Austria and the Netherlands, one would have thought that the Community Legislator and Member States would have been interested in the harmonisation of national competition laws to avoid disparities. However this has not been the case, for either or both of the following reasons;

- because the Community legislator is not interested in national legislation on Competition which does not affect trade between Member States,

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<sup>61</sup> This reform has already been implemented under Regulation 1/2003 which shall come into force by May 2003

<sup>62</sup> See Drahos at 107

<sup>63</sup> *ibid* at 107

<sup>64</sup> *ibid* at 108. This Austrian approach has been impliedly acknowledged under article 2 of the new Regulation 1/2003

<sup>65</sup> *ibid* at 108. In a like manner to the Austrian approach, the approach under Dutch Law has also been impliedly accepted by Regulation 1/2003

<sup>66</sup> Mortelmans, cited in Drahos at 109

- or because national Competition Laws have different national policy goals to that of EC competition.

However in the light of the fact that the “effects on trade “ test provides jurisdictional basis for allocating responsibility between the European Commission and National Competition authorities it does not; at least in relation to complaints and investigations initiated by national authorities provide a practical basis for allocation of jurisdiction.<sup>67</sup> For this reason is difficult to understand why harmonisation of national competition rules will not have a good case. Therefore as between Community Competition Law and National Competition Laws, it may seem that there will always be an overlap with respect to jurisdiction as well substantive Law. This overlap also gives room for the possibility to have cases which would have been scrutinised under national Competition Law but would not, because they affected trade between Member States, but are not scrutinised by Community authorities because they do not give rise to a significant Community interest.

This fear however seems to have been laid to rest by the Regulation 01/2003 giving full powers to national authorities to apply articles 81 and 82 of the EC Treaty, in close collaboration with the European Commission. This new regulation seems also to be the furthest the Community Legislator has gone in harmonising the application of EC Law by national authorities. This however does not mean the harmonisation of national Competition laws in the real sense of the word.

Furthermore the status quo on this puzzle related to the harmonisation of national Competition Laws within the Community remains virtually unchanged. This is indicative of the fact that the disparity between national competition policy and objectives prevails over the concern about the harmonisation of national competition rules within the Community. Thus for example, while the EC Competition rules grant exemptions for article 81(1), for agreements that contribute to promoting technical or economic progress, which are beneficial the consumers, the German Cartel Law instead makes a conscious choice not to grant an exemption for the same reasons. This is because the German instrument was meant not to serve industrial policy goals.<sup>68</sup> Similarly, the Austrian Cartel Law does not refer to the protection of competition but rather to general economic objectives such as price stability and employment, though increasing competition oriented goals are playing an increasing role.<sup>69</sup> The Austrian competition policy on environment and health can also be subsumed as objectives granting economic justification for the implementation of Austrian Competition Law.

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<sup>67</sup> See Coleman and Grenfell at 28

<sup>68</sup> See Drahos at 111

<sup>69</sup> *ibid* at 112

This few examples<sup>70</sup> on the disparity between EC and national competition objectives considered so far makes the case against the harmonisation of national Competition Laws within the Community tenable.

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<sup>70</sup> These examples besides that of the UK, were used to indicate a trend within the Community. The UK, approach will be dealt with in more detail, in subsequent sections of this work.

# 4 Mechanism for the implementation of Community Competition Law

## 4.1 Background

Regulation 17 contains the most important provisions relating to the application of articles 81 and 82 of the Treaty, which is still in force at present. The application of this Regulation on Competition will however cease to exist by May 1 2004, when the new Regulation<sup>71</sup> on the implementation of rules laid down in articles 81 and 82 of the Treaty, shall come into force. By virtue of article 43(1) of this new Regulation, article 8(3) of Regulation 17 shall continue to apply to decisions pursuant to article 81(3) of the Treaty, which were taken prior to the date of application of this Regulation, until the date of expiration of those decisions. Other Regulations related to Competition rules for undertakings have either been repealed or amended by this new Regulation and shall be so indicated in this new Regulation where appropriate.

Therefore, the Mechanism for the enforcement of Community Competition rules for undertakings shall be discussed with reference to the existing as well as the future regime.

## 4.2 Procedure under Regulation 17

Under the existing regime Exemptions to anti-competitive agreements falling under article 81(1) can be claimed under article 81(3) for the period after they have been notified to the Commission on the prescribed form.<sup>72</sup> As concerns agreements that satisfy the conditions of the various block exemptions Regulations prior notification is not necessary. These block exemptions applied through article 81(3) of the EC Treaty, entitles the Commission to lay down exemption Regulations to agreements falling under article 81(1) on the basis of powers conferred by the Council. These Regulations represent a significant relief of the Commission's administrative burden, at the same time offering considerable legal certainty to undertakings.<sup>73</sup>

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<sup>71</sup> Council Regulation 1/2003

<sup>72</sup> Article 24 Regulation 17 and new form A/B Regulation 3385/94, OJ 1994 L377/28

<sup>73</sup> See Case T-51/89 Tetra Pak Rausing SA v Commission [1990] ECR 11-309 at 362, cited in Kapteyn and Themaat at 867



The legal basis of notification can be summarised as follows<sup>74</sup>:

- Agreements otherwise contrary to article 85(1) (now 81(1)) of the EC Treaty which have not been notified are prohibited by law and are void.<sup>75</sup>
- The notification of an agreement identical to a standard agreement ipso facto makes the identical agreement to have the same legal effects to that of the standard agreement.<sup>76</sup>
- Only notified agreements are eligible for an exemption under article 85(3) (now 81(3)) of the EC Treaty.<sup>77</sup>
- Notified agreements for which exemptions have not been granted under article 85(3) (now 81(3)), enjoy immunity from fines, unless the Commission has lifted that immunity by means of the so called article 15(6) of Regulation 17 letter.<sup>78</sup>

Negative Clearance can also be issued by the Commission after the notification of an agreement or practice by an undertaking or group of undertakings as the case may be. This negative clearance indicates that on the basis of the information it has received, it has no grounds to intervene under article 81(1) or 82 of the EC Treaty, with respect to an agreement, decision or practice.<sup>79</sup> This implies that no exemption is needed.

Individual exemptions are also sometimes granted to an undertaking or group of undertakings, after the notification of an agreement or practice capable of violating article 81(1) or 82 of the EC Treaty. The granting of such individual exemptions, fall under the exclusive competence granted to the Commission by virtue of Regulation 17. This power is to grant exemptions, based on article 81(3) of the EC Treaty.<sup>80</sup> Exemption decisions are granted for a specific period of time, frequently for 10 years, and may be subject to conditions and obligations.<sup>81</sup>

By virtue of article 3 of Regulation 17, the Commission may adopt a decision requiring undertakings to cease and desist from infringements of article 81 and 82 which it finds proven. Such decisions may or may not include the imposition of fines.<sup>82</sup>

Before the Commission takes any decision as provided for in articles 2,3,6,7,8,15 and 16 of Regulation 17, the Commission shall give the undertakings or association of undertakings concerned, the opportunity of

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<sup>74</sup> *ibid* at 863-864

<sup>75</sup> Case 13/61 *De Geus v. Bosch* [1962] ECR 45

<sup>76</sup> Case 56/65

<sup>77</sup> Regulation 17 article 4(1)

<sup>78</sup> See Case 10/69 *Portelange* [1969] ECR 309

<sup>79</sup> Regulation 17 article 2

<sup>80</sup> *ibid* article 9(1)

<sup>81</sup> *ibid* article 8

<sup>82</sup> See article 15 of Regulation 17

being heard on the matters to which the Commission has taken objection.<sup>83</sup> In such circumstances, other natural or legal persons could also be heard.<sup>84</sup> Decisions of the Commission in application of article 81(3) of the EC Treaty, requires it to invite all interested third parties to submit their observations.<sup>85</sup>

Article 9 of Regulation 17 read jointly with article 230 of the EC Treaty, will indicate that review of the Commission's decisions on Competition issues, are carried out by the European Court of Justice. National Courts by virtue of the fact that articles 81(1) and 82 of the EC Treaty have direct effect, may themselves decide that agreements are prohibited and thus void, without it being necessary for the Commission to have first adopted a decision or initiated proceedings.<sup>86</sup> This shared jurisdiction runs the risk of the national Courts and the Commission, taking conflicting decisions.<sup>87</sup>

### 4.3 Procedure under the future regime

The major innovation brought about by the future regulation on the implementation of article 81 and 82 of the EC Treaty, is the decentralisation of the centralised regime that exists under the present Regulation 17. The need to meet up with the changes of an integrated and future enlargement of the Community as well as the need to ensure effective supervision, on the one hand, and to simplify administration to the greatest extent, on the other, also constitute some of the other major objectives of this new Regulation.<sup>88</sup>

This new Regulation is in contrast to the notification system which exists under Regulation 17, through which a negative clearance, individual exemption or a prohibition could be granted by the Commission after the notification of an agreement or practice which could violate articles 81 or 82 of the EC Treaty. This new Regulation does not require any notification to, nor a decision from, the Commission in similar circumstances, to declare infringements of article 81(1), prohibited or not, satisfying or not satisfying the conditions under article 81(3) as the case may be.<sup>89</sup> Similarly, any abuse of a dominant position referred to under article 82 of the EC Treaty shall also be prohibited without any prior decision being required.<sup>90</sup>

The provisions of these new regime cited so far imply that the undertakings will no longer benefit from the advantages they had during the notification procedure. Such advantages include the immunity from fines after

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<sup>83</sup> *ibid* article 19(1)

<sup>84</sup> *ibid* article 19(2)

<sup>85</sup> *ibid* article 19(3)

<sup>86</sup> See Kapteyn and Themaat at 870

<sup>87</sup> The mechanism to resolve jurisdictional issues, will be dealt with in part 2 of this work

<sup>88</sup> See recitals 1, 2, and 3 of Regulation 1/2003

<sup>89</sup> See *ibid* articles 1 and 2

<sup>90</sup> *ibid* article 3

notification, while awaiting the decision from the Commission under the present regime.

From all indications, under the new regime that will be in place with the coming into force of this new Regulations, there will be a burden of due diligence on undertakings to know whether their intended actions will infringe articles article 81(1) or 82, or shall fall under the exemption under article 81(3), of the EC Treaty, lest they face the negative consequences.

Article 7(1) of this new Regulation, clearly excludes the word “application” or any other word similar thereto, when referring to an application for an exemption under Regulation 17 article 3. Instead, this article only deals with the commencement of Commission’s investigations which could either be on its own initiative or from a complaint from a natural or legal person having a legitimate interest or from a Member State.<sup>91</sup>

The element of burden of proof in this new Regulation is also an innovation meant to ensure legal certainty. The person or authority alleging infringement of article 81(1) or 82 of the EC Treaty, has the burden to prove such infringement, while an undertaking or undertakings that claim the benefit of the exemption under article 81(3) shall bear the burden of proving that it meets such requirements.<sup>92</sup>

For a long time, the case law of the ECJ had allowed for the application of articles 81(1) and 82 of the Treaty, by the Courts of the Member States because of their direct applicability. This new Regulation has not only taken into consideration this case law, but it has also included the application of article 81(3) of the EC Treaty, by the national Courts of the Member States.<sup>93</sup>

Also included in this new Regulation as an innovation are interim measures for which the powers of its implementation have been given to the Commission.<sup>94</sup>

This new Regulation also provides for close co-operation between the Competition Authorities of the Member States<sup>95</sup> and the Commission as well as between the Commission and the ECJ with the Courts of the Member States<sup>96</sup>, on the implementation of articles 81 and 82 of the EC Treaty.

Extensive powers of investigation on possible infringements of articles 81(1) and 82 of the EC Treaty have been given to the Commission by this new Regulation. Such powers include:

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<sup>91</sup> See also article 7(2) of Regulation 1/2003

<sup>92</sup> *ibid* article 2

<sup>93</sup> *ibid* articles 5 and 6

<sup>94</sup> *ibid* article 8

<sup>95</sup> *ibid* article 11

<sup>96</sup> *ibid* article 15

- The Commission's power of inspection of undertakings and association of undertakings with respect to the implementation of this Regulation;<sup>97</sup>

- The power to enter the premises of undertakings in order to examine books and other records related to business, and ask for explanations from authorities of such undertakings or group of undertakings on the subject matter;<sup>98</sup>

- The Commission even has powers to carry out its investigations in places other than the premises of the undertakings or association of undertakings.<sup>99</sup>

The procedure used in carrying out such inspections is also provided for by this Regulation. Such aspects as the powers of investigation also include powers to national Member State Competition Authorities, to assist national authorities of other Member States to investigate infringements of articles 81(1) and 82 of the EC Treaty, that have taken place in their territory. This is supposed to be carried out according to the national law of the assisting Member State.<sup>100</sup>

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<sup>97</sup> *ibid* article 20

<sup>98</sup> *ibid*

<sup>99</sup> *ibid* article 21

<sup>100</sup> *ibid* article 22

# 5 Enforcement of U.K. Competition Law

## 5.1 Enforcement Authorities

According to the Competition Act, the principal competition authorities are the Office of Fair Trading (OFT), the Competition Commission, and the Secretary of State.

### 5.1.1 The Office of Fair Trading

The Office of Fair Trading, is headed by the Director General of Fair Trading (the Director). The OFT is responsible for the day to day operation of the regime under the Competition Act. This day to day activities include:

- Conducting investigations,
- Giving guidance on the application of the Act,
- Deciding whether the prohibition has been infringed,
- Granting exemptions from prohibitions and
- Taking enforcement measures including fines.<sup>101</sup>

### 5.1.2 Competition Commission

The Competition Commission is created by the Competition Act and is given two main functions:

- i) First appeals on decisions made by the Director can be made to it.<sup>102</sup>  
This appeals could include:
  - Appeals from persons against whose conduct the Director has taken a decision;<sup>103</sup>
  - An appeal against a decision stating that a chapter 1 or chapter 2 prohibition has been infringed, or regarding the grant of an individual

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<sup>101</sup> See Coleman and Grenfell at 14

<sup>102</sup> Competition Act 1998 section 46

<sup>103</sup> *ibid* section 46(1)

exemption or on the conditions imposed with respect to the exemptions<sup>104</sup> and

- Appeals on the cancelling of the exemption or the withdrawal or varying of decisions following third party appeals.<sup>105</sup>

ii) This Act also gives the possibility for third parties with sufficient interest in relevant decisions taken by the Director, to make appeals to the Competition Commission.<sup>106</sup>

Decisions made by the Competition Commission can be appealed further to the appropriate Court by a party or a person having sufficient interests in the decision in question.<sup>107</sup> Such appeals could be based on:

- a point of law arising from the decision of an appeal Tribunal, or
- any decision of an appeal Tribunal as to the amount which is to be paid as penalty.<sup>108</sup>

The Competition Commission also takes over the duties previously carried out by the Monopolies and Mergers Commission under the 1973 Fair Trading Act.<sup>109</sup>

### **5.1.2 Secretary of State**

The role of the Secretary of State under the Act is that of a rule making nature, which includes:

- Extending, restricting or removing exclusions from the Chapter 1 and Chapter 2 prohibitions,
- making Block Exemption orders following recommendations from the OFT, and
- Approving guidance given by OFT in relation to appropriate levels of penalties.

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<sup>104</sup> ibid section 46(3)

<sup>105</sup> ibid section 46(3)

<sup>106</sup> ibid section 46

<sup>107</sup> ibid section 49(2)

<sup>108</sup> ibid section 49(1)

<sup>109</sup> ibid section 45

## 5.2 Enforcement Mechanism

The enforcement mechanism for the Competition Act comprises of two main stages which are: the Notification procedure, and the investigation and enforcement of the prohibitions.

### 5.2.1 Notification

According to the Act, a person who thinks that his conduct may infringe the Chapter 1 Prohibition<sup>110</sup> or the Chapter 2 Prohibition<sup>111</sup> should make an application to the Director, notifying such conduct. On notification, the Director may give the applicant guidance as to whether or not his conduct is likely to infringe any of the above prohibitions. The Director may as well take a decision as to whether any of these prohibitions has been infringed and if not whether it is so as a result of exclusion.

The Director can not take further action with respect to a conduct for which he had previously given guidance or decision that that conduct does or does not infringe any of both prohibitions except in any of the following situations:

- i) Where the Director has reasonable grounds to believe that there has been a material change of circumstances since he gave his guidance; or
- ii) he has reasonable suspicion that the information on which he based his guidance was inaccurate; or
- iii) there is a complaint about the conduct.<sup>112</sup>

### 5.2.2 Investigation and enforcement of the Prohibitions

OFT has the following roles in relation to the investigation and enforcement of the prohibitions:

- i) If it has reasonable suspicion that the chapter 1 or Chapter 2 prohibition has been infringed, it will conduct an investigation.<sup>113</sup>
- ii) During the investigation, it will require the production of specified documents<sup>114</sup> and can enter and search premises.<sup>115</sup>

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<sup>110</sup> ibid section 12

<sup>111</sup> ibid section 23

<sup>112</sup> See ibid sections 14 and 15 of Chapter 1 prohibitions and sections 24 and 24 with respect to Chapter 2 prohibitions

<sup>113</sup> ibid section 25

<sup>114</sup> ibid section 26

<sup>115</sup> ibid section 27-28

- iii) OFT makes decisions on the alleged infringements based on its investigations and gives directives to the relevant persons to bring the infringement to an end.<sup>116</sup>
- iv) It makes applications to the Court for an appropriate order, when it has given a direction for a person to bring an infringement to an end and the person to whom it is made fails to comply without any reasonable excuse.<sup>117</sup>
- v) In specified circumstances, the Director may take interim measures prior to the completion of an investigation in order to prevent serious and irreparable damage.<sup>118</sup>
- vi) OFT on making a decision that there was an infringement may also require the payment of a penalty<sup>119</sup> and also take action for the recovery of the penalty<sup>120</sup>.
- vii) OFT has to prepare and publish guidance on the appropriate amount for the penalties with the approval of the Secretary of State.<sup>121</sup>
- viii) OFT can withdraw the immunity from penalties that otherwise applies to small agreements and conduct of minor significance.<sup>122</sup>

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<sup>116</sup> *ibid* section 32-33

<sup>117</sup> *ibid* section 34

<sup>118</sup> *ibid* section 35

<sup>119</sup> *ibid* section 36

<sup>120</sup> *ibid* section 38

<sup>121</sup> *ibid* section 38

<sup>122</sup> *ibid* section 39-40



**PART II**  
**RESOLUTION OF CONFLICTS ON JURISDICTION**

# 6 Prevalence of Community Law over National Law

## 6.1 Introduction

At one time, it was thought that the EEC (as the EC was formerly known) was based on a Public International Law Agreement that was binding only between signatory Member States. As such it could not create rights and obligations with respect to natural and legal persons which could be enforced by the national Courts. However through the principle of the Supremacy of Community Law over national Law and the direct effect of EC Law within the national sphere, the ECJ, changed this view.

## 6.2 Principle of Supremacy

In *Van Gend en Loos*<sup>123</sup>, the ECJ held that, by creating the Treaty, Member States had limited their sovereign rights within certain fields. In subsequent cases, the ECJ has confirmed that EC law takes precedence over national statutes<sup>124</sup> and even national Constitutions, which conflict with it<sup>125</sup>. According to this position taken by the ECJ therefore, in the event of a conflict between EC and national law, EC Law should prevail.

In *Walt Wilhelm*<sup>126</sup> parallel proceedings were being held by the European Commission and the German Competition Authority, on alleged price fixing agreements with the risk of a possible outcome of double sanctions. In this case the ECJ held that both decisions could be taken in parallel but this should not lead to the distortion of uniform interpretation of Community Law throughout the Community. It was also held that if national decision conflicts with that of the Commission, the national Court should take account of such effect. The Court added that there was no express prohibition on parallel proceedings, but that such proceedings should not conflict or prejudice Community Law or its measures.

The supremacy of Community Law on competition between undertakings over national law is illustrated by the *Eco-Swiss Case*<sup>127</sup> where it was held that national arbitration legislation was contrary to Community Competition

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<sup>123</sup> Case 26/62 *Algeme Transport-en Expenditure Onderneming Van Gend Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1

<sup>124</sup> See for example Case 6/64 *Costa v Ente Nazionale per l' Energia Elettrica (ENEL)* [1964] ECR 585

<sup>125</sup> Case *Internationale Handelsgesellschaft MBHB v Einfuhr-und Vorratsstelle fur Getreide und Futtermittel* [ 1970] ECR 1125

<sup>126</sup> Case 14/68, *Walt Wilhelm v Bundeskartellamt* [1969] ECR 1

<sup>127</sup> Case C- 126/97 *Eco-Swiss China Time Ltd v Bennetton International NV* [1999] ECR

Law. In this case Community Competition policy was likened to public policy.

### **6.3 Principle of Direct Effect of Community Law**

The principle of direct effect of Community Law is a mechanism created by the ECJ through which natural and legal persons can enforce EC Law in their national Courts. Articles 81 and 82 of the EC (formerly 85 and 86) have for a long time been held to be directly effective.<sup>128</sup> This means that undertakings and natural persons can bring actions in their national Courts, to obtain remedies against other undertakings, which breach these provisions.

### **6.4 Practical implication of both concepts**

The practical implication of both concepts of direct effect and supremacy is that any conflict between EC Competition rules and National Competition rules are resolved in accordance with the position under EC Law.<sup>129</sup> Furthermore since case law<sup>130</sup> with respect to both concepts indicates that remedies and sanctions granted in respect of EC Law must not be less effective than those granted in respect of national Law, it is expected that there will be a good deal of overlap in respect to the rights and remedies granted under both regimes.<sup>131</sup> Award of damages by national courts for breach of Community Law, is therefore possible on the basis of these analysis.

Elements of the Supremacy of Community Competition law over national Competition law can also be found under the future Competition regime<sup>132</sup>. According to this new Regulation<sup>133</sup> the application of national Competition Law may not lead to the prohibition of agreements, decisions by association of undertakings or concerted practices, which may affect trade between the Member States, but do not restrict Competition within the meaning of article 81(1) of the EC Treaty, or which fulfil the conditions under article 81(3), or are covered by a Regulation on the application of article 81(3) of the EC Treaty.<sup>134</sup>

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<sup>128</sup> See Case 127/73 BRTV v SABAM [1974] ECR 51

<sup>129</sup> See Coleman and Grenfell at 37

<sup>130</sup> See for example Case 158/80 Rewe-Handelsgesellschaft Nord mbh v Hauptzollamt Kiel [1981] ECR 1005

<sup>131</sup> Coleman and Grenfell at 37

<sup>132</sup> Regulation 1/2003

<sup>133</sup> article 3(2)

<sup>134</sup> See *ibid* article 3(3) for exemptions to article 3(2) of the same Regulation

The Competition Act 1998, also acknowledges this Supremacy, by imposing an obligation to follow EC Law, when it provides that when an agreement is exempt from Community prohibition, it also becomes automatically exempt from the Chapter 1 prohibition of the Act.<sup>135</sup>

Section 60 of this same Act also provides for a mechanism to ensure that so far as possible, questions arising on Competition issues within the UK are dealt with in a manner that is consistent with the treatment of corresponding questions arising in Community Competition Law. Such questions could be on procedure, non-competition issues related to the single market, comfort letters and preliminary rulings from the ECJ under article 234 of the Treaty.<sup>136</sup>

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<sup>135</sup> Section 10 of the Competition Act 1998

<sup>136</sup> See Coleman and Grenfell at 60



# 7 Co-operation between Community and National Competition Authorities

## 7.1 Co-operation under the present regime

Because of the direct effect of article 81(1) and 82 of the EC Treaty, it is possible for national Courts to themselves decide that agreements are prohibited and thus void, without it being necessary for the EC Commission to have first adopted a decision or initiated proceedings.<sup>137</sup> This implies that there is shared competence in the application of article 81(1) and 82 of the EC Treaty, between the Commission, and the national Courts. This shared jurisdiction however runs the risk of the Commission and the national courts reaching conflicting decisions. Such conflicting decisions could be for example that:

- A national Court may decide that an agreement is not incompatible with article 85(1) now 81(1) whereas the Commission later takes a decision prohibiting the agreement, or
- a National Court could decide that an agreement was very unlikely to be granted an exemption while the Commission later grants one.

In the *Delimitis*<sup>138</sup> case it was held that in the event of the possibility of such conflicting decisions, the appropriate course to be taken by the national Court is to stay the proceedings or adopt interim measures pursuant to its national rules of procedure. In the same case it was also said that in such a situation, the national Court may request the Commission to inform it of any procedure which may have been set in motion and of the likelihood of an official ruling. It may also seek legal or economic information from the Commission in order to enable it to cope with particular difficulties in the application of article 85(1) (now 81(1)) and 86 (now 82) of the EC Treaty. The Commission is bound by the duty of sincere co-operation with national judicial authorities to assist the latter, subject to respecting the requirements of confidentiality.<sup>139</sup>

The possibility of asking the Commission for information is without prejudice to the national Court's power, or, as appropriate, duty to make a reference to the ECJ under article 177 (now 234) of the EC Treaty.<sup>140</sup> The

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<sup>137</sup> See *Kapteyn and Themaat* at 870

<sup>138</sup> Case C- 234/89 *Delimitis* [1991] ECR I-935 AT 993

<sup>139</sup> *ibid*

<sup>140</sup> *ibid*

national Court is obliged to look at both the case law of the Court and the practice of the Commission.<sup>141</sup> In the event of doubt it may if possible and in accordance with national rules of procedure, obtain additional information from the Commission or allow the parties to seek a decision from the Commission.<sup>142</sup>

It is worthwhile to note that the ECJ has been prudent to phrase the national Court's part in this aspect of co-operation in the application of Community Competition Law in terms of "may" and "consistent with national rules of procedure" rather than in terms of an obligation as such.<sup>143</sup>

As a result of the *Delimitis* decision<sup>144</sup>, the Commission published a Notice on Co-operation<sup>145</sup> between national Courts and the Commission in applying articles 85(now 81) and 86 (now 82) of the EC Treaty.

## 7.2 Co-operation under the future regime

Under the existing regime on Competition Law within the Community, the national Courts already had the power to implement articles 81(1) and 82 of the EC Treaty by virtue of the direct effect doctrine. The co-operation mechanism between the national Courts and the Commission presented in the preceding section applies also to this doctrine under the present regime. However the future new Regulation<sup>146</sup> at the time when it shall come into force will extend the powers of the national Courts and Competition Authorities to include the application of article 81(3) of the EC Treaty. The mechanism for co-operation under this new Regulation is dealt with by its chapter IV (articles 11-16).

Article 11 deals with the co-operation between the Commission and the national Competition Authorities. Exchange of vital documents between the Commission and the National Competition Authorities is a key element of this article. The national competition Authorities are obliged to inform the Commission by writing without delay after commencing proceedings under article 81 and 82 of the EC Treaty.<sup>147</sup> No later than 30 days before adopting a decision with respect to alleged infringement of articles 81 or 82 of the EC Treaty, the competition Authorities of the Member States must inform the Commission.<sup>148</sup>

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<sup>141</sup> Case C-319/93 etc *Dijkstra et al. V Friestand (Frico Domo) Coöperatie BA et al* [1995] ECR I-4471 at 4510

<sup>142</sup> *ibid*

<sup>143</sup> *Kapteyn and Themaat* at 871

<sup>144</sup> Case C-234/89

<sup>145</sup> OJ 1993 C 39/6

<sup>146</sup> Regulation 1/2003

<sup>147</sup> *ibid* article 11(3)

<sup>148</sup> *ibid* article 11(4)

According to article 11(6) of this new Regulation commencement of proceedings by the Commission with respect to alleged infringements of article 81 or 82 of the EC Treaty, shall relieve Competition Authorities of the Member States of their competence to apply articles 81 and 82 of the EC Treaty. If the Competition authority of a Member State is already acting on a case, the Commission shall only initiate proceedings after consulting with that national Competition Authority.<sup>149</sup>

Under this new Regulation, co-operation between the Commission and national Courts, falls under article 15. In proceedings for the application of articles 81 and 82 of the EC Treaty, the Courts of the Member States may ask for information or opinion from the Commission concerning Community Competition rules.<sup>150</sup> A copy of the written judgements from the national Courts in this connection has to be forwarded to the Commission without delay.<sup>151</sup>

Under this new Regulation, it is also possible for Competition Authorities of other Member States and the Commission, to submit oral and written observations to the national Court.<sup>152</sup>

The provision requiring the uniform application of Community Competition Law under this new Regulation seems to be an implied recognition of the decision in *Delimitis*<sup>153</sup>. This new Regulation provides that it should be ensured that the national Court decision does not run counter to a decision adopted by the Commission initiated to that effect and that national Courts must also avoid giving decisions which conflict with a decision contemplated by the Commission in proceedings it has initiated.<sup>154</sup> It goes further to provide that in such a situation the national Court may assess whether it is necessary to stay its proceedings.<sup>155</sup> This obligation is without prejudice to the rights and the obligations of the national Court under article 234 of the EC Treaty.

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<sup>149</sup> *ibid*

<sup>150</sup> *ibid* article 15(1)

<sup>151</sup> *ibid*

<sup>152</sup> *ibid* article 15(3)

<sup>153</sup> Case 234/89

<sup>154</sup> Regulation 1/2003 article 16(1)

<sup>155</sup> *ibid*



# 8 Impact of EC Competition Law on National Competition Law

## 8.1 Introduction

As already mentioned in the previous chapter, the relation of EC Competition Law and National Competition Law is governed by the twin concepts of supremacy and direct effect, which must be applied within Member States irrespective of their local laws. With this in mind, the relationship between the Chapter 1 and Chapter 2 Prohibitions of the 1998 Competition Act and articles 81 and 82 of the EC Treaty are going to be analysed in this chapter. This notwithstanding, it is in fact possible to identify a number of different situations where the obligation to follow EC law may not arise.

## 8.2 Chapter 1 Prohibition and article 81 EC Treaty

Save with respect to the territory, in respect of which the anti-competitive effects are to apply, there is no explicit distinction between the Chapter 1 Prohibition and the Equivalent EC Prohibition under article 81 of the EC Treaty. It is possible to have a situation where an agreement may be subject to both EC and UK prohibitions, where for example it affects trade and competition within the UK and at the same time affects trade between the EC member States.

According to the Guidelines on the Chapter 1 Prohibition:<sup>156</sup>

*“article 85 (now 81)<sup>157</sup> applies to agreements which ‘ may affect trade between Member States’. The case law of the European Court has interpreted this phrase broadly: ‘ the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States,<sup>158</sup> and have found that even when the parties to the agreement are confined to the same country, inter-state trade may still be affected<sup>159</sup>. The term ‘trade’ has itself been interpreted broadly and covers the right of establishment and the free movement of suppliers as*

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<sup>156</sup> Guidelines on the Chapter 1 prohibition of the 1998 Competition Act, published by by the Office of Fair Trading, hereinafter Guidelines at paragraph 7.2

<sup>157</sup> Emphasis added by author

<sup>158</sup> Case 56/65

<sup>159</sup> Case 8/72 Vereeniging van Cementhandearen v Commission [1972] ECR 977 CMLR 7

*well as the movement of goods and services.<sup>160</sup> Given the breadth of this interpretation, many agreements will be caught by both articles 85 (now 81) and the Chapter 1 Prohibition where trade with the United Kingdom may be affected.”*

This burden caused by the overlapping jurisdictions is however reduced in practice due to the fact that the Chapter 1 prohibition is worded in a similar manner to the article 81 prohibition. Other provisions in the Competition Act also act as a safeguarding mechanism to such an eventuality. Automatic UK exemptions of agreements benefiting from EC exemption (parallel exemptions)<sup>161</sup> and immunity from the UK penalties for notification validly made; irrespective of whether it was made to the to the UK or EC authorities,<sup>162</sup> are some of the examples of the this mechanism.

Article 60 of the Competition Act further ensures that inconsistencies are avoided. It provides that when the UK courts act on competition issues, it should ensure that the principles applied and the decisions reached by this Court on Competition issues, are consistent with the principles laid down by the EC Treaty and the European Court, and any relevant decision of that Court at that time, in determining any corresponding question arising in Community Law, as well as have regard to any relevant decision or statement of the Commission.

It should be noted that article 1 of the new Regulation<sup>163</sup> empowers the national Courts to apply article 81 and 82 of the EC Treaty, when applying national Competition Law, where there is the possibility of either articles 81 or 82 being infringed.

### **8.2.1 Notification of possible overlapping Chapter 1 and article 81 prohibitions**

Faced with the possibility of making notifications for exemption to an agreement which may overlap between the Chapter 1 prohibition and article 81, either to the Commission or OFT or to both, it becomes necessary to explore and find out the most appropriate approach that should be taken by a prudent undertaking.

According to the Guidelines<sup>164</sup> at paragraph 7.4, there are several advantages in notifying agreements under article 85(1) (now81(1)) to the

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<sup>160</sup> Case 161%84 Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgalis, [1986] ECR 353, [1986] 1CMLR 414

<sup>161</sup> Section 10 1998 Competition Act

<sup>162</sup> See third of paragraph 7.4 of the Guidelines to the Chapter 1 prohibition of the Competition Act published by the Office of Fair Trading.

<sup>163</sup> Regulation 1/2003

<sup>164</sup> Guidelines to the Chapter 1 prohibition of the Competition Act published by the Office of Fair Trading.

European Commission rather than to the Director under the Chapter 1 prohibition. The reasons cited for this reasoning are as follows:

- Only the European Commission can give an exemption from article 85(1) (now 81(1)), which will automatically exempt the agreement from the Chapter 1 prohibition, whereas exemption from the Chapter 1 prohibition does not preclude the application of article 85(1)(now 81(1));
- The exemption from the Commission by virtue of article 85(3) (now 81(3)), has effect in all EC Member States but exemption by the Director has effect only in the UK; and
- provisional immunity from financial penalties under the Chapter 1 prohibition is available without notification to the Director who may not impose a penalty under the Chapter 1 prohibition if the EC Commission has not acted on a notification of the agreement made to it.

This same Guidelines<sup>165</sup> advise an undertaking involved with such a notification to notify the EC Commission as early as possible, because it does not have the power to grant retro-active exemptions in all cases. This power to grant such retroactive exemptions in all cases, is however available to the Director.

Where the inter-state criteria is not met but the agreement however does have an appreciable effect on Competition within the UK, according to this Guideline the Director will be the appropriate authority to be notified.<sup>166</sup> In the event that the mission considers that that such an agreement does not affect trade between the Member States the Director will endeavour to give priority to such cases.<sup>167</sup>

With the coming into force of Regulation 1/2003, by May 1 2004, this notification procedure to the Commission in the present regime will become irrelevant. It may seem that in the future, undertakings will have to rely on their prudence in order to appreciate whether or not such agreements fall under the prohibitions in article 81(1) of the EC Treaty or not, and if they do so fall whether they could benefit from the exemptions under article 81(3) or not.

Article 3 of this new Regulation empowers the national Courts and the Competition Authorities of the Member States to apply article 81 as well as 82 of the EC Treaty, but is silent on the aspect of notification. There is no obligation either on national Competition Laws to include notification procedures to national Competition Authorities. However since the UK

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<sup>165</sup> Guidelines to the Chapter 1 prohibition of the Competition Act 1998 published by the Office of Fair Trading.

<sup>166</sup> Paragraph 7.6

<sup>167</sup> *ibid* paragraph 7.7

Competition Law still provides for notification, it would seem that notification on agreements and practices under articles 81 and 82 of the EC Treaty will still be made to the Director. In such a situation instead of following the notification procedure under the Competition Act, the Director will be obliged to follow the procedure provided for under article 5 of this new Regulation in conformity with the Co-operation procedure under articles 11 to 14 of the same Regulation.

The practical implication if the UK procedure will still be providing for notification by the time this new Regulation will come into force, would seem to be that the desire to have similar texts between the UK and EC Competition Laws would be distorted thereby allowing for an undertaking to deal with conflicting procedures on issues which could likely overlap. However it is the opinion of this author that it is not necessary for the UK legislator to repeal the notification procedure under the Competition Act, so that it is modified in a like manner to the new EC Regulation. The reason being that the paramount reason for this change at the Community level was to reduce the workload of the Commission by allowing for decentralisation of Community Competition Law. This seems not to be the problem for UK and other national Competition Authorities. However it will be necessary to accommodate the Act to the new powers procedures provided for by this new regulation, especially with respect to the power to grant exemptions under article 81(3) of the Treaty provided for by this new Regulation.

### **8.3 UK Chapter 2 prohibition and article 82 EC**

The Chapter 2 prohibition of the 1998 Competition Act defined under section 18 is identical in many respects to article 82 of the EC Treaty. In order to comply therefore with the requirement of consistency with EC Law under section 60 of this Act, it is necessary that guidance on the interpretation of the key concepts of dominance and abuse can be obtained from a review of the decisions and practices of the ECJ and the European Commission. This notwithstanding, they still remain a number of differences between both provisions.<sup>168</sup> These differences could be summarised as follows.

- While article 82 of the EC Treaty deals with the Common Market, the Chapter 2 prohibition deals with the abuse of dominant position within the UK. In this connection the UK government has made it clear that there must be a dominance in a relevant market and that although this market must include the UK, it is not necessary that the market be entirely contained within the UK.<sup>169</sup>
- Under article 82 EC, the abuse must affect trade between the Member States, while under the Chapter 2 prohibition of the Act, the abuse should rather affect trade within the UK or any part of it. The territorial scope of

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<sup>168</sup> See Coleman and Grenfell at 210

<sup>169</sup> See *ibid* at 210

these latter criteria has a more significant effect in demarcating jurisdiction between the EC and the UK systems.

- The Act in giving examples of abusive behaviour refers to “conduct” which may constitute an abuse.<sup>170</sup> This is not the case under article 82 of the Treaty which does not make use of the term “conduct” but simply enumerates an in-exhaustive list of behaviour similar to those listed under the Act, which may constitute abuse of dominant position. It has been suggested that the reference to “conduct” in the Act has the effect of excluding omissions from the scope of this provision. However it is unlikely that these creates a substantive difference between the two provisions.

- There are exclusions to the Chapter 2 prohibition provided for by section 19 of the Act, whereas article 82 of the EC Treaty has no such equivalent.

The concept of the supremacy of EC law over national law presupposes that compliance with national legal requirements will not necessarily be a defence if a party has abused a dominant position under article 82 of the EC Treaty.<sup>171</sup>

Under the Act, there is also a general public policy exemption<sup>172</sup>, which empowers the Secretary of State to grant exclusions for exceptional and compelling reasons of public policy by making an order that the Chapter 2 prohibition will not apply in particular circumstances. Under EC Competition Law there is no such provision.

Under the EC Treaty<sup>173</sup> exceptions to competition rules apply to certain undertakings entrusted with certain public service obligations and revenue producing monopolies, if such Competition rules affect the performance of their functions. Schedule 3 of the Act, contains a similar provision.

Under Regulation 17 the sole indication of the requirement of notification of an agreement that might constitute the abuse of a dominant position is the use of the word “application” under article 3(2).<sup>174</sup> This requirement is however more explicit under the Act<sup>175</sup>, which provides that, when a person thinks that its conduct may infringe the Chapter 2 prohibition in such a case the applicant must apply for a decision<sup>176</sup> from the Director, who may either decide that the Chapter 2 prohibition has been infringed,<sup>177</sup> or that it has not been infringed as a result of the effect of an exclusion<sup>178</sup>.

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<sup>170</sup> Section 18(2)

<sup>171</sup> Joined Cases 43 and 63/82 *Vereniging ter Bevordering Van het Vlaamse Boekwezen and Vereniging ter Bevordering Van de Belangen des Boekhandels v EC Commission* [1984] ECR 19

<sup>172</sup> Section 19(4) Schedule 3 paragraph 7

<sup>173</sup> Article 86

<sup>174</sup> However this requirement is more explicit under the Merger Regulation.

<sup>175</sup> Section 20

<sup>176</sup> Section 22(2)(b)

<sup>177</sup> Section 22(2)(a)

<sup>178</sup> Section 22(2)(b)

With regards to the new Regulation<sup>179</sup> the element of notification is not necessary and the abuse of a dominant position is simply prohibited; no prior decision to that effect being required<sup>180</sup> and the burden of proving such abuse lies with the person alleging such infringement<sup>181</sup>.

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<sup>179</sup> Regulation 1/2003

<sup>180</sup> *ibid* article 1(3)

<sup>181</sup> *ibid* article 2



# 9 Jurisdictional issues on EC and U.K. merger control

## 9.1 EC Merger Control

Merger control in Europe, functions according to the 'one stop shop principle'. According to article 1 of the Regulation<sup>182</sup>, if a Merger reaches a "Community Dimension", it is only subject to European Merger Control. Member states may therefore not apply their national Competition Law to such concentrations.<sup>183</sup>

Under specific circumstances, this clear-cut delineation of jurisdiction does not apply. The Commission may upon the application of a member state, refer the assessment of a concentration to this State.<sup>184</sup> This delegation may take place when a merger has an impact on a "distinct market" of the Member State. Furthermore article 21(3) of this Regulation establishes that Member States "may take appropriate steps to protect legitimate interest other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community Law". This could be the case where public security, plurality of the media and prudential rules are concerned, for which Member states may intervene in certain aspects of concentration.<sup>185</sup> This does not however mean that a government may permit a merger prohibited by the Commission of the European Community.<sup>186</sup>

Under article 22 (3) of the Merger Regulation, a Member State may ask the EC Commission to deal with a Merger that normally falls under national jurisdiction, even though they do not have a Community Dimension.<sup>187</sup>

## 9.2 UK Jurisdiction on the control of Mergers and Concentrations (Schedule 1 and Section 3(2) Competition Act)

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<sup>182</sup> Council Regulation 4064/89

<sup>183</sup> *ibid* article 21

<sup>184</sup> See Drahos at 81

<sup>185</sup> *ibid* at 81

<sup>186</sup> *ibid*

<sup>187</sup> This will be the case if the Concentration will significantly impede competition within the requesting Member States and affects trade between Member States (See Drahos footnote 11 at 106)



Outside the Competition Act, there are provision under both UK and EC law, which ensure that mergers and other concentrations comply with competition requirements. These provisions are to be found both in the EC Merger Regulation<sup>188</sup> and in the merger provisions of the Fair Trading Act 1973.

Because there was the feeling that such mergers and concentrations should not also have to be examined under chapter 1 prohibition because this would have led to a double onerous regulatory burden on businesses, and the possibility of ‘double jeopardy’, Schedule 1 of the Competition Act therefore excludes from the Chapter 1 prohibition, most kinds of mergers and concentrations.<sup>189</sup>

Under the Competition Act, there is exclusion for agreements, which are subject to the exclusive jurisdiction of the European Commission under the Merger Regulation.<sup>190</sup>

Though the element of ‘exclusive jurisdiction’ of the European Commission in this connection is required to be able to invoke this exclusion, it is likely that it will not apply in all cases where certain exemptions to the exclusive jurisdiction of the Commission are raised. The most relevant exception here is the provision that Member States may in parallel with European Commission jurisdiction under EC Merger control take appropriate measures in respect of the transaction to protect ‘legitimate interests’ other than Competition.<sup>191</sup>

The Commission might also refer back certain concentrations to the Member State’s national Competition Authorities on the grounds of its effects on a distinct market within that Member State.

However exclusions of mergers and concentrations from the Community dimension does not ipso facto mean exclusion Under UK Merger Control Law, regulated by 1973 Fair Trading Act (FTA).

### **9.2.1 UK jurisdiction on merger control under FTA 1973**

Schedule 1 of the Competition Act also grants exclusions for ‘merger situations’ as defined in the Fair Trading Act 1973. However, OFT has the power to withdraw the exclusion in certain circumstances such as those which are not full acquisitions or take-overs and which have not either been cleared by the Secretary of State or referred to the Competition Commission and found to be qualifying mergers.<sup>192</sup>

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<sup>188</sup> Council Regulation 4064/89 ammended by council Regulation 1310/97

<sup>189</sup> See Grenfell and Coleman at 105

<sup>190</sup> Schedule 1 paragraph 6(1) and (3)

<sup>191</sup> Article 21(3) of the Merger Regulation

<sup>192</sup> See Grenfell and Coleman at 108

Section 64 of the FTA provides that a merger occurs where two or more enterprises have ‘ ceased to be distinct. Section 65 elaborates the circumstances in which enterprises cease to be distinct. If the enterprises in question agree between themselves that one should cease production in order to prevent competition between them, this constitutes a merger.<sup>193</sup> Also if the enterprises come under common ownership, they cease to be distinct.<sup>194</sup> They will also do so when they come under common control.<sup>195</sup> The concept of merger situations under the FTA, encompasses all full take-overs, full acquisition of businesses and all acquisition of majority voting interest in a company. It also extends to the acquisition of lower levels of control including the ability to exercise material influence. The formation of a joint venture may also be a merger situation, if its effects are that one or more parents acquire at least material influence over a pre-existing business or enterprise.<sup>196</sup>

Newspaper mergers in the UK are subject to a stricter form of control than other mergers. The reason for this is that the control of the media is a matter of particular political sensitivity, and that the concentration of the press in too few hands could stifle the expression of opinion and arguments and distort the presentation of news.<sup>197</sup> The relevant provisions are contained in sections 57-62 of FTA 1973.

The analysis in this subsection however will be based principally on the control of other mergers other than newspaper mergers as covered by the FTA 1973, in conjunction with the Competition Act.

Whereas the FTA considers that the ability to exercise material influence or control or the actual exercise or control may be regarded as a merger situation, the Competition Act makes it clear that the exclusion definitely does apply in any of these cases.<sup>198</sup>

This approach under the Competition Act is similar to that under The EC Merger Regulation, which talks of the creation or reinforcement of a dominant position as being contrary to EC merger rules. This line of thinking implies that merger situations, which actually or potentially creates or re-enforces a dominant position, are covered.

Under the FTA a merger situation, is the basis for jurisdiction for merger control by UK competition authorities. Qualifying mergers are defined as being those merger situations where either the gross value of the assets taken over exceed £70 million, or, in respect of any product or service which the merging business both supply (or which they both consume) in the UK, their combined share of such supply (or consumption) is at least

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<sup>193</sup> FTA 1973 Section 65(1)(b)

<sup>194</sup> *ibid* section 65(1)(a)

<sup>195</sup> *ibid*

<sup>196</sup> Coleman and Grenfell at 107

<sup>197</sup> See Wish at 672

<sup>198</sup> See Grenfell and Coleman at 109

25%. However, the exclusion from the Chapter 1 prohibition of the Competition Act applies to all merger situations irrespective of whether the are qualifying mergers or not.<sup>199</sup>

The exclusion from the Chapter 1 prohibition also extends to ancillary restrictions. These are restrictions, which are directly related, and necessary to the implementation of the concentration or merger. They include for example restrictive covenants in a sale of a business agreement under which the vendor agrees not to compete against the business sold.<sup>200</sup> Though such restrictions are not directly covered by the EC Merger Regulation; which rather speaks of agreements which give rise to a ‘concentration’, this ancillary restriction can be implied from the fact that the EC Merger Regulation<sup>201</sup> is stated to apply also to restrictions ‘directly related and necessary to the implementation of the concentration’.<sup>202</sup>

The European Commission has issued a Notice regarding restrictions ancillary to concentrations, to assist actual and potential interpretation of the concept of ‘restrictions which are directly related and necessary to the implementation’ of a concentration. Since exactly the same words to those in the exclusion for the FTA merger situations under the Competition Act<sup>203</sup> are used, the European Commission Notice may be regarded as a valuable guide to interpretation the concept in the FTA merger context as well<sup>204</sup>.

Under section 3(2) of the Competition Act, the Secretary of State may at any time by order amend schedule 1 dealing with the exclusion for mergers and concentrations so as to add new exclusions, or remove or amend existing exclusions. Under section 3(5), such an order may provide for removal of the benefit of exclusion from a particular agreement.

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<sup>199</sup> *ibid*

<sup>200</sup> *ibid*

<sup>201</sup> Recital 25

<sup>202</sup> See Coleman and Grenfell at 109

<sup>203</sup> Schedule 1, paragraph 1

<sup>204</sup> Coleman and Grenfell at 110

# 10 Conclusion

EC and National Competition Laws may share one economic objective of making the respective markets more competitive, but differ in other policy goals.

The main objective for Community Competition Law is to attain closer integration between Member States and also has as objective the improvement on research and development within the Community. Its objectives also include such sectoral policies as those on agriculture and transport. Other policies like those on the Environment and culture, which can not really be considered as economic objectives, have to be integrated in the practice of Community Competition Law because they are other major objectives of the EC Treaty.

At the national levels, however other policy considerations do not coincide with that of the Community. If the UK Competition Law seeks to make its market more competitive, the German Cartel Law was meant to serve other policies than industrial goals and would not grant exemptions similar to those under article 81(3). The Austrian Cartel Law on its part does not refer to the protection of competition but rather refers to general objectives such as price stability and employment even though competition oriented goals are playing an increasing role. Austrian competition policy on health and the environment also justifies the application of Austrian Competition Law.

The scope of EC law on competition between undertakings covers anti-competitive agreements between two or more undertakings, companies abusing their dominant position and mergers and acquisitions.

Whereas article 81(3) provides for exemptions to article 81(1), no such exemptions are available for article 82.

At present the implementation of articles 81 and 82 fall under Regulation 17 which shall be repealed as from May 1 2004, when a new and more decentralised regime shall be put in place.

Merger Regulation 4046 and its subsequent amendments continue to be the main rules that govern the control of mergers and acquisitions within the Community.

The Community dimension on competition issues was clarified in STM-MBU case where it was said that a prohibition should be available where trade between Member States may be affected through actual or potential, direct or indirect breach of Community competition rules. The *De Minimis* Notice issued by the Commission also serves as a guideline on what situations could fall under the Community Jurisdiction. But the fact that this Notice has been undergoing frequent revisions implies that the criteria on

Community dimension in competition issues remains volatile and it is expected that there are still going to be subsequent amendments to this Notice. It may seem that the important factor on what constitutes Community dimension still remains within the whims and caprices of Community Authorities who are to decide on the criteria as to whether trade between Member States has been affected or not after their analysis. Faced with this situation, the best solution for firms to avoid being sanctioned based on this volatile criterion is the notification procedure to the Commission provided for under Regulation 17. But since this will be repealed in the future with the coming into force of the new Regulation, the best approach for undertakings in the future will be to make notifications to competent National Competition Authorities which have notification procedures under their National Laws. This will be possible since under the future regime, they will be competent to fully apply article 81 and 82 of the EC Treaty.

However for the time being the Merger Regulation still provides for the notification procedure to the Commission. The status quo for EC merger control now includes not only concentrative joint ventures but also co-operative joint ventures. This was intended to avoid the confusion on distinction and different legal treatment, which hitherto existed when co-operative joint ventures fell under article 81 of the EC Treaty.

Territorial applicability of EC Competition Law remains the position taken by the ECJ in the Wood-Pulp I case, which is when any anti-competitive activity, has effects within the Territory of the European Union.

The UK Competition Law on its part is governed principally by the Competition Act 1998. Other important laws regulating competition in the UK include the Enterprise Act 2002, and the FTA 1973.

Under the Competition Act, the Chapter I prohibition is similar to article 81 of the EC Treaty while the Chapter II prohibition is similar to article 82 of the EC Treaty. Merger control is predominantly based on the FTA, with minor modifications made thereto by the Competition Act. Criminalisation of Anti-trust behaviour is found under the Competition Act and re-enforced under the Enterprise Act.

The similarity between UK and EC prohibitions are intended to avoid double jeopardy and regulatory burden on undertakings against whom the laws of both jurisdictions could apply. However this prohibitions are not applied in a similar manner because the policy goals within both jurisdictions are different. This disparity in policy goals is illustrated by the fact that vertical and land agreements are exempted from chapter I prohibition whereas such agreements still fall under article 81 of the EC Treaty.

The Competition Act radically departs from EC Competition Law, by introducing the concepts of exclusions and separate treatment.

Whereas an excluded agreement under this Act completely falls outside the scope of the Chapter I prohibition, an exemption falls within the scope of the Chapter I prohibition or article 81(1) of the EC Treaty but because of offsetting economic benefits, they are exempted from such prohibitions. Separate treatment on the other hand is based on an order from the Secretary of State protecting an agreement from the Chapter I prohibition either by exclusion or exemption or even otherwise.

The territorial applicability of UK Competition law is when it affects trade within the UK.

By providing for the criminalisation of anti-competitive acts, the UK Competition Law makes another radical departure from that of the EC. The rationale behind this idea is simple. If penalties have not served as sufficient deterrent for undertakings not to engage in anti-competitive activities it is more likely that fear of imprisonment by physical persons involved in such transactions will. It is a good idea to think that the EC legislator should copy this approach. However if this should be the case, it will require radical legislative reform at both Community and national levels.

Examples from the UK and other Member States indicate that there is a trend towards local Competition Laws adopting provisions similar to those under articles 81 and 82 of the EC Treaty. Even though this has not been as a result of any Community legislation or recommendation. Rather this trend is taking place as a result of the need to avoid double jeopardy on the part of undertakings which otherwise will be faced with totally different texts on the same issues, all of which are applicable to them. Despite this trend there seems not to be any move yet towards the harmonisation of National Competition Law at the Community level. One of the reasons for this outcome would likely be because of the disparity in policy objectives between the different Member States on the one hand the Community on the other hand. Another reason could also be that the Community legislator is not interested in national legislation on Competition which does not affect trade between the Member States.

The criteria on anti-competitive acts, which affect trade between the Member States, which gives Community jurisdiction to a situation, can lead to a situation where cases, which overlap between Community and National Jurisdictions, could remain unscrutinised. This would be the case where National Authorities believe a case in question has a Community dimension whereas the Commission may decide that the case does not give rise to a significant Community interest. However this vacuum seems to have been remedied by the future Regulation 1/2003 by virtue of which national Courts will be fully empowered to apply articles 81 and 82 of the EC Treaty. This new Regulation also seems to be the furthest the Community legislator has gone towards the harmonisation of National Competition laws. This however means that application of EC Competition law at national levels have been harmonised but it does not mean the same thing as the harmonisation of domestic Competition Laws.

This new Regulation is intended to decentralise the centralised regime that exists under Regulation 17. It has got rid of the notification procedure for anti-competitive agreements under Regulation 17, which for the time being is still in force. Similarly any abuse of a dominant position under this new regime will simply be prohibited without requiring any prior decision to that respect. In the future therefore due diligence will be required from undertakings in order for them to avoid sanctions for breach of articles 81 and 82 of the EC Treaty. However competent National Competition Laws which will still be allowing for notification procedures when this new Regulation shall come into force will serve as a solace to this undertakings. To such competent National Authorities, it will be possible for undertakings to make applications for exemptions by virtue of the fact that this new Regulation will empower them to do so. However notifications to the OFT Director in this case under UK national Law for example will require it to follow the procedure provided by articles 11 to 15 of the new Regulation, dealing with co-operation with the Commission. This Author believes that because of this possibility, it will become necessary to accommodate the Competition Act to the new realities that will be created by the coming into force of this Regulation.

This new Regime also acknowledges the concept of the supremacy of Community Competition Law over that at the national level. This supremacy is also acknowledged by the Competition Act, which for example imposes an obligation to follow, EC Law by granting automatic exemptions from Chapter I prohibitions for agreements exempted under Community Law. The Competition Act also requires consistency in the treatment of corresponding questions arising from Community Competition Law.

The co-operation mechanism imposes a duty of sincere co-operation for the Commission and the ECJ, with National Courts and Competition Authorities, to ensure the uniform application of articles 81 and 82 of the EC Treaty at the National level. The *Delimitis* case, which broadly enunciated this duty of co-operation, led to a Commission Notice on Co-operation. This co-operation will in the future be enhanced by Regulation 1/2003. In order to avoid double application by Commission and National Authorities of articles 81 and 82 of the EC Treaty, This new Regulation provides that National Competition Authorities shall be relieved of their competence to apply any of both articles when the Commission commences proceedings for a particular situation. It also specifies that if a National Competition Authority had already commenced proceedings, the Commission shall initiate proceedings after consulting with the national Authority in question.

This new Regulation has adopted the position taken by the ECJ on co-operation in the *Delimitis* case.

Under the present regime, there is the possibility of making applications to either or both the Commission and for example the OFT in the UK jurisdiction, for an exemption to Chapter I prohibition under the present regime. OFT Guidelines indicates the advantages, which exist to notify such agreements first to the EC Commission rather than to the Director. The rationale for this is based on the concept that national law follows that of the EC. However notifications to the Commission according to this Guidelines have to be made as early as possible because the Commission does not have the power to grant retroactive exemptions like the Director. For Cases which do not have appreciable effect on Community Trade it will be appropriate to notify them to the Director.

In order to ensure consistency with respect to the application of the Chapter II prohibition and article 82 of the EC Treaty, the Competition Act requires that guidance on the interpretation of key concepts of dominance and abuse can be obtained from the review of decisions and practices of the ECJ and the European Commission. However, differences still exist between the Chapter II prohibition and article 82 of the EC Treaty at the level of policy considerations and Territorial applicability. For example exclusions can be granted for Chapter II prohibitions whereas there are not even exemptions available under article 82 of the EC Treaty.

Merger control between for example the EC and the UK, is rather of a peculiar nature as compared to the implementation of the prohibitions under the Competition Act and articles 81 and 82 of the EC Treaty. The power given to National Authorities to apply national merger control is wider. Such wide powers being based on the need for them to protect their legitimate interests in a 'distinct market' not covered by the Regulation and compatible with general principles and other provisions of Community Law. However, national governments can not permit mergers prohibited by the Commission.

Unlike in the case of the prohibitions under EC and UK and other National Competition Laws, there seems not to be any tendency towards adapting national merger control to become similar to that of the EC. Rather it seems the reverse situation may be the case. For example the FTA dates as far back as 1973 and is still in force whereas the Merger Regulation introduced in 1989 has gone through several amendments up to 1997 and will likely be amended further in the near future.

The Competition Act excludes agreements falling under the jurisdiction of the European Commission's jurisdiction under the Merger Regulation. This notwithstanding, the exclusive jurisdiction could become inapplicable in cases where exemptions to the exclusive jurisdiction of the Commission could become applicable; for example a situation necessitating the protection of a legitimate interest rather than Competition between Member States.



The Concept of Merger under the FTA is defined in a wider and more explicit manner than in the Merger Regulation.

Merger control under the FTA also covers ancillary restrictions directly related and necessary to the implementation of the concentrations or merger. Though such ancillary restrictions are not directly covered by the Merger Regulation they have been implied therefrom. The EC Commission has issued a Notice regarding these ancillary restrictions which are similar in wording to those in the exclusion for FTA merger situations found in the Competition Act. This Commission Notice can be regarded as a valuable guide to interpretation of the concept of ancillary restrictions under the FTA merger context as well.

In conclusion, despite some similarities between EC and National Competition laws, the disparities in substantive law and jurisdictional issues between both Competition Laws will continue to subsist in the near future. Appropriate mechanisms through case law and legislation have been put in place to ensure the smooth co-habitation of both jurisdictions. This notwithstanding, it will be difficult to envisage a lasting solution to the problems raised by the need for co-habitation at both levels. The reason for this is that new economic and policy realities will always necessitate regular reform in this domain. The enlargement of the European Union may become one example of change in circumstance that might necessitate radical changes in Community as well as national rules on Competition. It is also worthwhile to note that the scope of EC competition seems to be gradually eroding National Competition Laws because of its wide interpretation.

# Supplement B

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