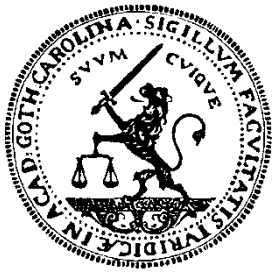

FACULTY OF LAW
Lund University

Madleen Düdder

The Relationship between the European Commission and Courts of the Member States in the Enforcement of EU Competition Law in Light of Decentralisation and Subsidiarity as Part of New Governance

Master thesis
30 credits

Prof. Dr. Xavier Groussot

Master´s Programme in European Business Law

Summer 2012

Contents

Summary

Compared to other areas of EU law, where the Commission is only the guardian of the Treaty, in the area of competition law it has enforcement powers. The enforcement is shared with the courts of the Member States. There are a number of instruments and rules, some newly introduced by the competition law modernisation, to ensure coherent application of EU law in a system of parallel competences. Those instruments, namely the Commission opinion to national courts and its intervention as *amicus curiae* create a number of uncertainties and legal problems with regard to their scope, addressees and binding effect. Another instrument to enhance uniform application is to oblige national courts not to contradict Commission decisions. It is still not clear if this obligation has to be interpreted narrowly or broadly or if there might actually be a positive binding effect of Commission decisions on national courts. Depending on how this issue may be solved by the Court of Justice, it might also affect the judicial independence of judges in the national courts.

The far reaching powers of the Commission, including the possibility to issue contradicting decision at any time, even after a national judgement has become binding are not only a threat to the legal certainty and the rights of the parties involved but also question if one can actually speak of a decentralised enforcement system of EU competition rules.

Acknowledgements

This thesis finishes my Master Studies at Lund University which has been a enjoyable and inspiring time which has seen me grow personally as well as academically. I would like to thank my fellow students, who made this time what it was and filled it with interesting discussions. I would also like to thank my parents for their support and encouragement and without whom this would have not been possible. Thank you also to my ‘sambo’ Dan for keeping up my spirits and making sure I take a break to eat.
I especially like to thank my supervisor Prof. Dr. Xavier Groussot for his guidance and constructive criticism.

Abbreviations

AEUV	Vertrag über die Arbeitsweise der Europäischen Union (TFEU)
CCP	Centre for Competition Policy
CFR	Charter of Fundamental Rights of the European Union
CJEL	Columbia Journal of European Law
CJEU	Court of Justice of the European Union
CLRev.	Competition Law Review
CMLRev.	Common Market Law Review
CMLR	Common Market Law Reports
DG	Directorate General
EBLRev.	European Business Law Review
EC	European Community
ECHR	European Convention on Human Rights
ECLMD	European Competition Law Monthly Digest
ECLRev.	European Competition Law Review
ECN	European Competition Network
ECR	European Court Reports
ECSC	European Coal and Steel Community
EEA	European Economic Area
EEC	European Economic Community
e. g.	latin: for example
EGC	European General Court
ELJ	European Law Journal
E.L.Rev.	European Law Review
et al	latin: and others
et seq.	latin: and the following ones
EU	European Union
EuR	Zeitschrift für Europarecht
EUV	Vertrag über die Europäische Union (TEU)
EWCA	England and Wales Court of Appeal
fn.	footnote
n	note
OJ	Official Journal
OMC	Open Method of Coordination
p.	page
pp.	pages
para(s).	paragraph(s)

SAAP	State Aid Action Plan
TEU	Treaty of the European Union
TFEU	Treaty of the Functioning of the European Union
UKHL	United Kingdom House of Lords
U.S.	United States
Vol	Volume
WC	Journal of World Competition
ZfRV	Zeitschrift für das gesamte Handels- und Wirtschaftsrecht

1 Introduction

Competition law is one of the main foci in the European harmonisation process and its goal is to achieve a functioning internal market. To find the best way to achieve this is not an easy task and the policies chosen may need to be reviewed. The Commission has reviewed its antitrust and state aid policies with the result of a new policy direction and a new system for antitrust enforcement. What has not changed is the fact that national courts play an important role in realising Union competition law. What has changed in the process of modernising European competition law is the more important role that courts of the Member States now play in the enforcement of EU competition law and their relationship with the European Commission. Because of this unique and close collaboration, it is interesting to analyse how this relationship is defined in the context of the general hierarchical structure and allocation of powers in the Union. This thesis examines the relationship between the Commission and national courts through the lens of the principles of decentralisation and subsidiarity, which emerged as methods in the development of new governance in the Union. New governance creates a challenge for European law as it creates a gap that seperates traditional conception of law and new governance.[1]

Chapter 2 will set the scene and draw an overview of the bigger picture of governance and policy in EU competition law. This will help the reader to understand the context of the discussion and provide important background information of the change in governance.

The Chapter 3 will outline the legal basis for the Commission competences and its cooperation with national courts.

Chapter 4 analyses the way in which the Commission and the courts of the Member State cooperate in the enforcement of EU competition law. There are three main instruments that form the relationship – the possibility for the court of the Member State to request from the Commission information or an opinion and the possibility of the Commission to intervene in national proceedings as *amicus curiae*.

Commission decisions are not addressed to the courts of the Member States and thereby not an instrument *per se* regulating their relationship, it has however great influence on the procedure at the court. Chapter 5 therefore focuses on analysing the effects of Commission decisions on national court procedures.

The possibilities and instruments for the Commission to interact in national court procedures seem to cause conflicts with the institutional requirement of separation of powers and the judicial independence. Hence, this will be the focus of Chapter 6.

Chapter 7 then continues to discuss further implications of a Commission intervention in national court procedures on the parties and on the issue of conflicting procedures.

Finally, Chapter 8 will summarise the findings and try to make an overall

[1] J. Scott; D. M. Trubek, "Mind the Gap: Law and New Approaches to Governance in the European Union", 8(1) (2002) ELJ, p. 8.

evaluation of the relationship between the Commission and the courts of the Member States in the light of new governance. It will also give a further outlook on related issues that have not been part of this thesis.

1.1 Purpose

The purpose of this paper is to analyse the nature of the relationship of the Commission and courts of the Member States in the enforcement of EU competition law the light of new governance versus principles of the constitutional and federal legal order.

1.2 Method

The thesis is a literature research. It is based on an analysis of the relevant legislation, doctrine, case law (mainly from the Union courts) as well as Communications, information or otherwise published information from the European institutions. I have used a comparison between the enforcement of EU antitrust and state aid law. To analyse the relationship between the national courts and the Commission, the instruments and legal basis for their cooperation are first described. Then it discusses the identified problematic areas.

1.3 Delimitations

Even though this thesis touches upon political and economical issues, for example when talking about policy methods and new governance, mainly in chapter 2.1, its focus is upon legal analysis.
The relationship between the Commission and courts of the Member States has been discussed often under the headline of public versus private enforcement of competition law. Many of the discussion in this thesis might be similar to the ones under such an analysis; however, the point of departure is a different one.
EU competition law enforcement is shared between three actors – the Commission, national courts and national competition authorities (NCA). There is various literature that discusses problems in relation to enforcement by the latter,[2] but is not part of the analysis in this thesis.
The tasks of the Commission or the national court in the enforcement of EU competition law enforcement are not described exhaustively but only to the extent that it is relevant for the further analysis.
Many of the discussions in this paper focus on the area of antitrust law, leaving state aid at the side. This is due to the fact that state aid enforcement is still the competence of the Commission and is only partly shared with the national courts.

[2] *See*, e. g., S. Brammer, "Concurrent Jurisdiction under Regulation 1/2003 and the Issue of Case Allocation", 42(5) (2005) CMLRev.

1.4 Definitions

The term ‘antitrust law’ will be used here in relation to Articles 101 and 102 TFEU. The term ‘state aid law’ will be used to refer to Articles 107 and 108 TFEU and the term ‘competition law’ will be used to embrace both areas. The expression ‘national courts’ in this thesis will be used synonymous to ‘courts of the Member States’.

2 EU Competition Law in Change

In line with an overall change in the European Union to new governance methods, competition law has undergone a set of reforms also affecting its enforcement. As a result, the shared competences between the Commission and national courts in enforcement of Union competition law has continuously undergone changes in the past. This chapter aims at placing the enforcement of EU competition law within the context of the movement towards new governance methods. The discussion on new forms of governance will outline some of the reasons for the changes. The key methods and elements described below of how new governance can be characterised, are the ones against which the collaboration between the Commission and national courts will be analysed. Drawing this bigger picture and identifying the flaws of the pervious systems will help understanding the shift towards the more decentralised methods. It also builds the background for further analysis in this thesis.

2.1 Subsidiarity and Decentralisation as Instruments of New Governance

The studies of governance and "new governance" in the EU, originating from the political sciences, have found their way into the legal literature on European law.[3] According to the Commission, "governance" means rules, processes or behaviour that affect the way in which powers are exercised at a European level.[4]

The term "new governance" is far from clear and the academic and policy discussions on this issue are broad and complex.[5] Even the issue of novelty of the governance is highly debated. In contrast to political definition of new governance, the legal literature defines new governance mainly in terms of opposition to classic law-making processes and legislative sources as enshrined in the Treaty.[6] *Scott* and *Trubek* define new governance as any major departure from the classic Community Method, premised upon the Commission's exclusive right of legislative initiative and the legislative (and budgetary) powers of the Council of Ministers and the European Parliament, which includes both new and alternative methods.[7] Others like *Sabel* and *Zeitlin* describe new governance by reference to its architecture.[8]

[3] C. Scott, "Governing Without Law or Governing Without Government? New-ish Governance and the Legitimacy of the EU", 15(2) (2009) ELJ, p. 161.
[4] Commission White Paper on European Governance, COM(2001) 428, p. 8.
[5] G. de Búrca; J. Scott, *Law and New Governance in the EU and the US* (2006), p. 2.
[6] A. Gatto, "Governance in the European Union: A Legal Perspective", 12(2) (2006) CJEL, p. 491.
[7] J. Scott; D. M. Trubek, "Mind the Gap…", *supra* n 1, pp. 1, 5.
[8] C. F. Sabel; J. Zeitlin, "Learning from Difference: The New Architecture of Experimentalist Governance in the EU", 14(3) (2008) ELJ.

Craig and *de Búrca* have summarised the debate about the shift to new modes of governance, moving away from hierarchical governing to more flexible forms of governance.[9]

In European studies, new governance is most closely associated with the Lisbon Strategy 2000[10], which has been followed by the Europe 2020[11] Strategy.[12] The overall aim of the Lisbon Agenda, the new strategic goal, was to improve the EU's competitiveness and economic performance vis-à-vis the United States reaching it through a range of ambitious policy goals.[13] There exists a variety of different specific regulatory initiatives through which new governance is expressed. The most developed forms of governance in the EU are for example the New Approach to harmonisation and standardisation[14], the Open Method of Coordination as well as the broader governance reform initiatives. As envisaged in the Lisbon Strategy 2000, the Open Method of Coordination was supposed to involve a fully decentralised approach in line with the principle of subsidiarity in which the Union, the Member States, the regional and local levels, as well as the social partners and civil society, will be actively involved, using variable forms of partnership.[15]

The subsidiarity principle was formally introduced in the Maastricht Treaty and retained by the Lisbon Treaty. It means, as Article 5 (3) TEU reads, that the Union shall act in areas which do not fall within its exclusive competence only, if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level. It is, however, not totally clear if this principle can be applied here. The General Court dealt with the principle of subsidiarity. The Court found that the principle of subsidiarity calls into question the powers conferred on the Union by the Treaty, as interpreted by the Court. It cannot however be invoked to question the competences that have been conferred on the Commission by the Treaty, which include the application of the competition rules and, in particular, the right to commence investigations.[16] It is simply not legally pertinent to the operation of the network and the way Union competition law is enforced, and has no place in the determination of which competition authority is best placed to handle a case.[17] *Komninos* has also questioned the relevance of subsidiarity,

---

[9] P. Craig; G. de Búrca, *EU Law – Text, Cases and Materials* (2011), pp.159, 161.

[10] Lisbon European Council, Presidency Conclusions, 24 March 2000 (Lisbon Strategy 2000).

[11] European Council Conclusions, June 2010.

[12] I. Maher, "Regulation and Modes of Governance in EC Competition Law: What's New in Enforcement?", 31(6) (2007) Fordham International Law Journal, p. 1721.

[13] P. Craig; G. de Búrca, *supra* n 9, p. 163.

[14] Most recent development: Decision of the European Parliament and Council, [2008] OJ L218/82.

[15] Lisbon Strategy 2000, *supra* n 10, para. 38; For further analysis of the OMC *see*, e. g. K. Armstrong; C. Kilpatrick, "Law, Governance, or New Governance? The Changing Open Method of Coordination", 13(3) (2007) CJEL; E. Szyszczak, "Experimental Governance: The Open Method of Coordination", 12(4) (2006) ELJ.

[16] Case T-339/04 *France Télécom SA* v *EC Commission* [2007] II-521, paras. 88-89.

[17] Francesco Rizzuto, "Parallel Competence and the Power of the EC Commission under Regulation 1/2003 according to the Court of First Instance", 29(5) (2008) ECLRev., pp. 290-291.

arguing that in its strict legislative sense it does not apply to EU competition rules at all and because the aim of decentralisation is different from that of subsidiarity, which is connected only with practicality and efficiency.[18]However, even if subsidiarity might not be applicable *per se* but it may as well serve a broader general principle when examining the decentralised enforcement as a whole.

How is this important? The influences of those new governance tools have affected both EU substantive competition law and its enforcement. Decentralisation and subsidiarity are the two main modes of the new governance that have influenced the procedural changes of EU competition law and therefore build the lens through which the relationship between the Commission and national courts in EU competition law will be analysed. Further on in this thesis other methods of new governance will appear mainly in the form of the discussion about use of soft law. In contrast to political scientists, who focus on the necessity of ensuring that governance mechanisms meet the standards of participatory democracy, legal literature tends to address European governance against the benchmark of the legal structures as specified in the EU Treaties or developed by the case law of the European Courts.[19]

2.2 Specific Changes in Antitrust Law

Antitrust policy was historically one of the most centralised parts of the EU system with the most transfer of power from the Member States to the Commission and the European Courts.[20] In its White paper from 1999[21] the Commission reassessed the old system under an extensive investigation and suggested for the first time a far reaching reform of the EU Antitrust Law. The traditional regime[22] worked under the general prohibition of restrictive agreements and practices unless they were expressly permitted. Under this system, which had worked for 40 years, the Commission had an exemption monopoly over the application of Article 101(3) TFEU.[23] Regulation 17 secured the Commission's position in two ways: first, it gave the Commission the authority and investigatory powers to enforce Articles 81 and 82 EC; second, it secured the Commission's central role within Article 81 EC by reserving it the sole power to grant exemptions under Article 81(3) EC.[24]

The proposal for reform in the White paper was a reaction from the Commission to the increasing criticism centred at the backlog of unanswered notifications, the length of procedures and insufficient

[18] A. P. Komninos, "Modernisation and Decentralisation: Retrospective and Perspective" in G. Amato; C.-D. Ehlermann (eds), *EC Competition Law* (2007), pp. 636-637.
[19] A. Gatto, "Governance in the European Union…", *supra* n 6, p. 491.
[20] C. F. Sabel; J. Zeitlin, "Learning from Difference…", *supra* n 8, p. 298.
[21] Commission, White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, OJ C 132/1 (1999) (hereinafter 'White paper').
[22] Means EEC Council Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty, OJ 1962/204.
[23] P. J. Slot, "A View from the Mountain: 40 Years of Development in EC Competition Law", 41(2) (2004) CMLR, p. 468.
[24] K. Middleton, *Cases and Materials on UK and EC Competition law* (2009), p. 24.

transparency.[25] Furthermore, the Commission has brought forward as reasons the growth of the Community. It also redefined its roll, now wanting to focus its attention on the most important cases and on those fields of activity, where it can operate more efficiently than national bodies.[26] Following the White paper, in 2003 the old Regulation No. 17 had been substituted by Regulation 1/2003[27] which entered into force in May 2004.[28] The changes of the new regulation can be summarised in four main points.
First, the system of prior authorisation has been replaced by a directly applicable exception system. This means that agreements, decisions and concerted practices are relieved from the requirement of notification but are rather automatically legal if they fulfil the legality requirement of Article 101(3) TFEU. The second change is the decentralisation of the system instead of a decision monopoly of the Commission. The workload of handling the enforcement is now shared between the Commission, national authorities and national courts.[29] This change strongly affected the relationship between the Commission and the national courts. National courts and competition authorities are since able to apply Article 101 and 102 TFEU in their entirety. Third, the Commission is equipped with some new powers, allowing it to initiate inspections and gather information.[30] Lastly, the new system involves a greater participation of more actors and the creation of a European Competition Network (ECN) under which the Commission and national competition authorities cooperate.
It has been pointed out, for example by Commissioner Monti that the changes introduced by the Regulation will 'bring the European enforcement system closer to the U.S. model'.[31] In the legal literature there are also discussions on the similarities between the European and U.S. approach in enforcement of competition law. The decentralisation, which made enforcement now at both Union and Member State level possible is similar to the U.S. enforcement of federal antitrust law both at federal and the state level.[32] But there are also major differences between the systems which makes a shift to the U.S. system detrimental as *Paulweber* argues, since there are a number of instruments that are essential to the success of the U.S. system which would have to be changed as well, like incentives for private

[25] C.-D. Ehlermann, "The modernisation of EC Antitrust Policy: A Legal and Cultural Revolution", 37(3) (2000) CMLRev., p. 541.
[26] White paper, *supra* n 21, paras. 5, 8-9.
[27] Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 04.01.2003, p.1.
[28] Some authors have argued that decentralisation and application of competition law in full by national courts is nothing more than turning back to normal: *See*, K. Lenaerts; D. Gerard, "Decentralisation of EC Competition Law Enforcement: Judges in the Frontline", 27(3) (2004) WC, p. 318
[29] Regulation 1/2003, *supra* n 27, Recital 3.
[30] *Ibid*, Recital 25.
[31] M. Monti, European Commissioner for Competition Policy, Antitrust in the US and Europe : A History of Convergence, Speech at General Counsel Roundtable American Bar Association Washington DC, 15.11.2001, SPEECH/01/540; J. S. Venit, "Brave New World: The Modernization and Decentralisation of Enforcement under Articles 81 and 82 of the EC Treaty", 40(3) (2003) CMLRev., p. 569.
[32] J. S. Venit, "Brave New World…", *supra* n 31, p. 569.

enforcement, punitive damages or contingency fees.[33]
Decentralisation in Antitrust law has been given effect by repealing the notification system, by empowering national competition authorities and to apply Articles 101 and 102 TFEU directly and full. Provisions which are expressions of decentralisation are Articles 4, 5, 6, 25 (3) and 29 (2) of Regulation 1/2003.[34]

2.3 Specific Changes in State Aid Law

EU state aid law has not undergone any such drastic reforms as the EU Antitrust law. The Commission commissioned a consultation exercise in 2005, aimed to reform the state aid system.[35] The state aid reform is set around the guiding principles of less and better targeted State aid, a refined economic approach, more effective procedures, better enforcement, higher predictability and enhanced transparency and a shared responsibility between the Commission and Member States.[36] The majority of changes that followed concerned the substantive part of EU state aid law or other areas of procedure than the relationship between the Commission and national courts. However, the enforcement of state aid law through national courts was not totally neglected. In its 2005 State Aid Action Plan (SAAP), the Commission highlighted the need for better targeted enforcement and monitoring in the area of state aid and stressed that private litigation in front of national courts could therefore provide an important tool of realising this aim.[37] In 2006, the Commission instituted a study on the enforcement of state aid law at national level.[38] It revealed an increase of private enforcement of competition law in national courts but also that only a small number of claims are aimed at enforcing compliance with state aid rules.[39] The main development affecting this relationship is the Notice of the Commission from 2009 on the Enforcement of state aid law by national courts, which replaced the 1995 Cooperation Notice[40]. Thereby, the Commission seeks to develop its cooperation with national courts by introducing more practical tools for supporting national judges in their daily work.[41]

---

[33] M. Paulweber, "The End of a Success Story? The European Commission's White Paper on the Modernisation of the European Competition Law", 23(3) (2000) WC, p. 46.
[34] R. Nazzini, "Parallel and Sequential Proceedings in Competition Law: An Essay on the Modes of Interaction between Community and National Law", 16(2) (2005) EBLRev., pp. 252-253.
[35] European Commission, State Aid Action Plan, Less and Better Targeted State Aid: A Roadmap for State Aid Reform 2005-2009, 7.6.2005, COM(2005)107 final.
[36] First set out in State Aid Action Plan, supra n 35; most recently in European Commission, State Aid Scoreboard, Spring 2011 Update, 22.6.2011, COM(2011) 356 final, p. 53.
[37] State Aid Action Plan, *supra* n35, para. 55.
[38] European Commission; DG Comp, Study on the Enforcement of State Aid Law at National Level, March 2006.
[39] European Commission, Commission Notice on the Enforcement of State Aid Law by National Courts OJ 2009 C 85/01, Recital 4 (hereinafter 'State Aid Cooperation Notice').
[40] European Commission, Commission Notice on Cooperation between National Courts and the Commission in the State Aid Field, OJ C 312, 23.11.1995, p. 8.
[41] *Ibid*, Recital 6.

3 Legal Basis of Shared Competence

As stated above, the benchmark for the analysis of the relationship between the Commission and national courts in EU competition law will be the legal structure of the Treaty, EU legislation and the case law. It is therefore important to understand the basis and scope of the competences of the Commission and national courts. In most fields of Union law, the Commission has only the role as guardian of the Treaty with the power to bring infringement actions against Member States and the power to apply EU law is fully with the Member States and the national courts. In the field of competition law, the Commission has the power to itself apply the rules to companies and Member States which is an autonomous power of direct enforcement and an essential tool to establish competition policy and to contribute to a coherent application of the EU competition rules.[42]
The rules for applying both antitrust and state aid law are derived from the Treaty Articles, secondary legislation, general principles of EU law and the case law. This chapter therefore gives an overview of the competences of the Commission and the national courts when it comes to the enforcement of EU competition law.

3.1 Antitrust Law

The main antitrust rules in the Lisbon Treaty are enclosed in Articles 101 and 102 TFEU. The Commission has the leading role in determining EU antitrust policy,[43] a task it has to carry out in the public interest.[44] Dependant on the functions attributed to them under their national law, national courts apply EU antitrust rules where a natural or legal person asks the court to safeguard his subjective individual rights in administrative, civil or criminal proceedings.[45] National courts can give effect to Articles 101 and 102 TFEU by declaring agreements or decisions void and award damages. They may further enforce Commission decisions or regulations by applying Article 101(3) TFEU to certain categories of agreements, decisions or concerted practices.[46] The Antitrust Cooperation Notice stressed the different objectives of the enforcement by the Commission and the national courts. Whereas the former is an exercise of administrative function in the public interest, the latter adjudicate disputes over rights and obligations of the

[42] E. Paulis, "Coherent Application of EC Competition Rules in a System of Parallel Competencies" in C.-D. Ehlermann; I. Atansiu (eds), European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy 2001, p. 405.
[43] White paper, *supra* n 21, Recital 14.
[44] Case T-24/90 *Automec* v *Commission II* [1992] ECR I-2223, paras. 73, 85; Case C-234/89 *Delimitis* [1991] ECR I-935.
[45] European Commission, Commission Notice on the Co-operation between the Commission and the Courts of the EU Member States in the Application of Articles 81 and 82 EC, OJ C 101, 27.4.2004, p. 54 (hereinafter 'Antitrust Cooperation Notice').
[46] Antitrust Cooperation Notice, *supra* n 45, para. 7.

parties in the area of private law.[47] The relationship between the Commission and the national court is hence often discussed as public *versus* private antitrust enforcement. To realise their distinct tasks, the Commission and the national courts have concurrent powers of enforcement. There are no rules in the Treaty explicitly providing for the cooperation between the Commission and the national courts. This emphasises the importance of the case law of the Union courts described below. Furthermore, a number of instruments of cooperation between the Commission and national courts can be found in the Regulation 1/2003, especially Articles 15 and 16 thereof. Those provisions are complemented by the Commission's Notice on the cooperation between the Commission and the courts of EU Member States in the application of (ex) Articles 81 and 82 EC.[48]

The Commissions' power to ensure the application of the principles set out in Articles 101 and 102 is based on Article 105 TFEU and legislation, particularly Regulation 1/2003, that has been adopted according to Article 103 TFEU.

The enforcement power of national courts stems from the direct applicability of the Articles 101 and 102 TFEU which the Court has established in a competition law context in *BRT v SABAM*[49].[50] In the more recent case *Courage v Crehan* the CJEU has confirmed that Articles 101 and 102 produce direct effects in relations between individuals and create rights for the individuals concerned which the national courts must safeguard in relation to damages for losses caused by breach of Union antitrust rules.[51] The power to apply those Articles entirely is now also codified in Article 6 of Regulation 1/2003. According to *Van Schijndel*, where domestic law confers on national courts a discretion to apply of their own motion binding rules of law, the national court must apply the EU antitrust rules, even when the party with an interest in application of those provisions has not relied on them, where domestic law allows such application by the national court.[52] However, national courts are not required to raise of their own motion an issue concerning the breach of provisions of Union law where examination of that issue would oblige them to abandon the passive role assigned to them by going beyond the ambit of the dispute defined by the parties themselves and relying on facts and circumstances other than those on which the party with an interest in application of those provisions bases his claim.[53]

Article 3 (1) of Regulation 1/2003 requires a parallel application of Union antitrust law where a national court applies national antitrust law to agreements, decisions, or concerted practices that may affect trade between

---

[47] Antitrust Cooperation Notice, *supra* n 45, para. 4.

[48] Antitrust Cooperation Notice, *supra* n 45.

[49] Case 127/73 *Belgische Radio en Televisie and société belge des auteurs, compositeurs et éditeurs* v *SV SABAM and NV Fonior* [1974] ECR 51, paras. 15, 17; direct applicability of Article 102 TFEU follows by analogy.

[50] K. Middleton, *supra* n 24, p. 104.

[51] Case C-453/99 *Courage Ltd* v *Crehan* [2001] ECR I-6297, para. 23; *see also* Case C-282/95 P *Guérin Automobiles* v *Commission* [1997] ECR I-1503, para. 39.

[52] Antitrust Cooperation Notice, *supra* n 45, para. 3; Joined Cases C-430/93 and C-431/93 *Van Schijndel* [1995] ECR I-4705, paras. 13-15.

[53] Joined Cases C-430/93 and C-431/93 *Van Schijndel*, *supra* n 52, para. 22.

Member States under Article 101 TFEU or any abuse prohibited under Article 102 TFEU.

When it comes to the parallel application of national and Union antitrust law, Article 3 (2) of Regulation 1/2003 provides for a convergence obligation, meaning that national antitrust laws may not lead to a different outcome than that of EU antitrust law where there is an effect on trade between Member States.[54] This means that where Article 101 TFEU does not prohibit an agreement, decision or concerted practice, the national court cannot apply stricter national rules and vice-versa it may not allow a conduct that is prohibited by Article 101 TFEU.[55] As to the parallel application of national antitrust law and Article 102 TFEU, the Regulation 1/2003 does not provide for a similar convergence rule, meaning national courts may apply stricter rules on unilateral conduct under Article 102 TFEU.[56]

In case of conflict between Union and national antitrust rules, the Court has established in *Walt Wilhelm*, following the general principal of supremacy of Union law established in the *Costa v ENEL* case, the precedence of Union antitrust rules.

Furthermore, national courts are bound by existing Commission decisions and they may not adopt decisions running counter to an already existing Commission decision on that subject.[57] This issue will be discussed in greater detail in Chapter 5 and 7.2.

Additionally, Article 4 (3) TEU provides for mutual assistance when carrying out tasks that flow from the Treaties and obliges Member States to facilitate the achievement of Union tasks. Thus, Article 4(3) TEU implies that the Commission must assist national courts when applying Union law.[58] Similarly, national courts may be obliged to assist the Commission in the exercise of its tasks.[59]

As national courts are those courts and tribunals that can refer to the CJEU for a preliminary reference procedure under Article 267 TFEU.[60] The arrangements established for the cooperation between the courts of the Member States and the Commission are relevant for all courts of the Member States that apply Articles 101 and 102 of the Treaty, whether applying these rules in lawsuits between private parties, acting as public

---

[54] Antitrust Cooperation Notice, *supra* n 45, para. 6.

[55] Antitrust Cooperation Notice, *supra* n 45, para. 6; Case 14/68 *Walt Wilhelm* [1969] ECR 1; Joined Cases 253/78 and 1 to 3/79 *Giry and Guerlain* [1980] ECR 2327, paras. 15-17.

[56] Antitrust Cooperation Notice, *supra* n 45, para. 6.

[57] Article 16 (1) Regulation 1/2003; Antitrust Cooperation Notice, *supra* n 45, para. 8.

[58] Case C-2/88 *Zwartveld and Others* [1990] ECR I-3365, paras. 16-22; Case C-234/89 *Delimitis*, *supra* n 44, para. 53; Antitrust Cooperation Notice, *supra* n 45, para. 15.

[59] Case T-398/07 *Kingdom of Spain* v *European Commission* [2012] ECR n.y.r., para. 40; Case C-94/00 *Roquette Frères* [2002] ECR I‑9011, para. 31; Antitrust Cooperation Notice, *supra* n 45, para. 15.

[60] For the criteria of what can be regarded as courts or tribunals within the meaning of Article 267 TFEU, *see* e. g. Case C-516/99 *Schmid* [2002] ECR I-4573, para. 34: 'The Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter parties, whether it applies rules of law and whether it is independent'.

enforcers or as review courts.[61]
In principle, national courts apply national procedural rules. However, they must comply with the general principles of Union law. Those require, in particular, the possibility to ask for damages[62] and provide for effective, proportionate and dissuasive sanctions[63] if there is an infringement of Union law. Those procedures and sanctions must not make such enforcement excessively difficult or practically impossible (the principle of effectiveness)[64] and they must not be less favourable than the rules applicable to the enforcement of equivalent national law (the principle of equivalence)[65].

3.2 State Aid Law

The core state aid rules in the Lisbon Treaty are contained in Articles 107 and 108 TFEU. The Court has emphasised that in the application and enforcement of state aid rules, the Commission and the national courts have distinct and complementary roles.[66] The Commission is responsible for constantly reviewing all existing aid combined with a control system of any new plans to alter or grant aid measures.[67] The Commission has furthermore the monopoly to rule on the compatibility of aid with the Single Market.[68]
Both, Commission and national courts have the power to rule on the notion of state aid.[69] While national courts have no jurisdiction to rule on the compatibility of aid with the Single Market, they must ensure that Member

[61] Regulation 1/2003, Recital 21, second sentence; Antitrust Cooperation Notice, *supra* n 45, paras. 1-2.
[62] See Case C-453/99 *Courage and Crehan*, *supra* n 51, paras. 26 and 27; Joined Cases C-6/90 and C-9/90 *Francovich* [1991] ECR I-5357, paras. 33 to 36; Case C-271/91 *Marshall* [1993] ECR I-4367, paras. 30, 34-35; Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029; Antitrust Cooperation Notice, *supra* n 45, para. 10(b).
[63] Case 68/88 *Commission* v *Greece* [1989] ECR 2965, paras. 23-25; Antitrust Cooperation Notice, *supra* n 45, para. 10(a).
[64] *See*, e. g., Case 33/76 *Rewe* [1976] ECR 1989, para. 5; Case 45/76 *Comet* [1976] ECR 2043, para. 12; Case 79/83 *Harz* [1984] ECR 1921, paras. 18 and 23; Antitrust Cooperation Notice, *supra* n 45, para. 10(c).
[65] *See*, e.g., Case 33/76 *Rewe*, *supra* n 64, para. 5; Case 158/80 *Rewe* [1981] ECR 1805, para. 44; Case 199/82 *San Giorgio* [1983] ECR 3595, para. 12; Case C-231/96 *Edis* [1998] ECR I-4951, paras. 36 and 37; Antitrust Cooperation Notice, *supra* n 45, para. 10(c).
[66] Case C-368/04 *Transalpine Ölleitung* [2006] ECR I-9957, para. 37; Joined Cases C-261/01 and C-262/01 *Van Calster and Cleeren* [2003] ECR I-12249, para. 74; Case C-39/94 *SFEI and Others* [1996] ECR I-3547 para. 41.
[67] P. Adriaanse, "Public and Private Enforcement of EU State Aid Law" in H.-J. Blanke; S. Mangiameli (eds) *The European Union after Lisbon – Constitutional Basis, Economic Order and External Action* (2012), p. 445; State Aid Cooperation Notice, *supra* n 39, para. 20.
[68] Case C-199/06 *CELF* [2008] ECR I-469, para. 38; Case C-17/91 *Lornoy and Others* v *Belgian State* [1992] ECR I-6523, para. 30; Case C-354/90 *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others* v *France* [1991] ECR I-5505, para. 14; State Aid Cooperation Notice, *supra* n 39, para. 20.
[69] *See*, e. g., Case C-308/01 *GIL Insurance and Others* [2004] ECR I-4777, para. 69; Case C-387/92 *Banco Exterior de España* v *Ayuntamiento de Valencia* [1994] ECR I-877, para. 13; Case C-39/94 *SFEI and Others*, *supra* n 66, para. 58; Case C-237/04 *Enirisorse* [2006] ECR I-2843, para. 42; State Aid Cooperation Notice, *supra* n 39, para. 10.

States comply with their procedural obligations. The main role of the national courts is to safeguard rights which individuals enjoy due to the direct effect of the prohibition in the last sentence of Article 108(3) TFEU. This essential role is also due to the fact that the Commission's own powers to protect competitors and other third parties against unlawful aid are limited. As the CJEU held in its *Boussac*[70] and *Tubemeuse*[71] judgments, the Commission cannot adopt a final decision ordering recovery merely because the aid was not notified in accordance with Article 108(3) of the Treaty.[72] Actions brought before national courts may be such as for damages, recovery or interim measures, preventing the payment of unlawful aid, recovery of unlawful aid (regardless of compatibility), recovery of illegality interest, damages for competitors and other third parties and interim measures against unlawful aid.[73] National courts are also able to review the De Minimis Regulation[74] and General Block Exemption Regulation[75] the Commission has adopted in state aid, as direct applicability follows from Article 288 TFEU. However, they can only decide on whether all the conditions in the regulation are fulfilled but not on the compatibility with the Single Market.[76] Additionally, national courts must give full effect to Commission decisions.

As already stated under the antitrust section above, there are no rules in the Treaties regulating the cooperation between the Commission and national courts in state aid. The guiding principles for the cooperation can be found in the case law, the Commission's Notice on State Aid and the Regulation 659/1999. As to the notion of national courts, there is no definition in the regulation nor in the Commission's Notice on State Aid, but it appears only logical that it also means all court or tribunals within the meaning of Article 267 TFEU.[77]

The principle of supremacy requires national courts, when dealing with state aid issues, to leave national procedural rules unapplied if doing otherwise would violate the principles of equivalence and effectiveness.[78]

As already stated under the antitrust section above, when national courts apply national procedural rules, they must comply with the general principles of Union law when doing so.

3.3 Evaluation

It seems, that there is a difference as to the degree of decentralisation

[70] Case C-301/87 *France* v *Commission* ('Boussac') [1990] ECR I-307.
[71] Case C-142/87 *Belgium* v *Commission* ('Tubemeuse') [1990] ECR I-959.
[72] State Aid Cooperation Notice, *supra* n 39, para. 25.
[73] State Aid Cooperation Notice, *supra* n 39, para. 26.
[74] Commission Regulation (EC) No. 1998/2006 on the Application of Articles 87 and 88 of the Treaty to De Minimis Aid, O.J. L 379/5 (2006).
[75] Commission Regulation (EC) No. 800/2008 Declaring Certain Categories of Aid Compatible with the Common Market in Application of Article 87 and 88 of the Treaty (General Block Exemption Regulation), O.J. L 214/3 (2008).
[76] State Aid Cooperation Notice, *supra* n 39, para. 16.
[77] *See*, *supra* n 60-61.
[78] Case 106/77 *Simmenthal* [1978] ECR 629, paras. 21, 24; State Aid Cooperation Notice, *supra* n 39, para. 71.

between antitrust and state aid law. In the area of antitrust law, national courts can fully apply Articles 101 and 102 TFEU. For state aid, however, there is a stronger division of competences in the enforcement of Articles 107 and 108 TFEU.
What is equally true for both areas is the obligation of the national court to comply with the general principles of Union law and especially the supremacy of Union law over national law and obligations resulting there from.

4 Ways of Cooperation

Since the direct effect of Article 101(3) TFEU, cooperation between national courts and the Commission has become more important in order to enhance effective and consistent application of competition law. Given the central role of national courts, the success of decentralised competition law enforcement depends to a large extent on the national court's ability to apply the law correctly and consistently.[79] This requires mechanisms to regulate the cooperation between the national courts and the Commission. In antitrust law, the main provision regulating the cooperation is Article 15 of Regulation 1/2003. For state aid law, the only source of information is the Commission's Notice on State Aid Enforcement by National Courts. In antitrust law, there are three dimensions of Commission assistance to national courts, namely the right of the national court to seek an opinion from the Commission, the right of the Commission to submit *amicus curiae* briefs and, finally, transmission of information between the Commission and the national court. The second dimension, the interference of the Commission as *amicus curiae*, is not available in the cooperation between the Commission and national courts in state aid law. Since the cooperation between the Commission and the national courts is mutual, the latter also have some obligations. As the Commission's right to submit an opinion and to interfere as *amicus curiae* intervene most with the proceedings at a national court, they will be described first and in greater depth, followed by a description of transmission of information and assistance of national courts to the Commission. Following, there will be an analysis of the legal value and binding force of the opinion and the *amicus curiae* intervention.

4.1 Opinion

With regard to antitrust law, Article 15(1) of Regulation 1/2003 provides that in proceedings for the application of Articles 101 and 102 TFEU, national courts may ask the Commission for an opinion on questions concerning the application of Union competition rules. Further principles and procedures are set out in the Antitrust Cooperation Notice in paragraphs 27 to 30. Accordingly, a national court may first seek guidance in the case law of the Union courts or in Commission regulations, decisions, notices and guidelines. Only where these tools do not provide sufficient guidelines, a national court may ask the Commission for an opinion on economic, factual and legal matters.[80] In the light of the independence of the courts,[81] the Commission will limit itself to providing the national court with the factual information or the economic or legal clarification asked for, without

[79] L. O. Blanco (ed), *EC Competition Procedure* (2006), p. 84.
[80] See also Case C-234/89 *Delimitis*, *supra* n 44, para. 53; Joined Cases C-319/93, C-40/94 and C-224/94 *Cornelis van Roessel and others* v *Campina Melkunie* [1995] ECR I-4471, para. 34.
[81] As affirmed in the Antitrust Cooperation Notice, *supra* n 45, para. 19.

considering the merits of the case pending before the national court.[82] The Commission must assist the national court in a neutral and objective manner. As the Commission opinion represents part of its duty to defend the public interest, it has no intention to serve the private parties involved in the case before the national court and will therefore not hear them before issuing its opinion.[83] The possibility to ask the Commission for an opinion was already part of the 1993 Notice and its inclusion in the regulation represents a formalisation of the mechanism and suggests a hardening of the obligation of mutual cooperation.[84]

With regard to state aid law, advice on the Commission's opinion is provided for in section 3.2 of the Commission Notice on State Aid. Whilst the previous Cooperation Notice already entailed the possibility for national courts to ask the Commission for assistance, this possibility has not been used regularly by national courts.[85] The Commission therefore decided to make a new attempt at establishing closer cooperation with national courts by providing more practical and user-friendly support mechanisms, where it drew inspiration from the Antitrust Cooperation Notice.[86] The just described principles and procedures of the Antitrust Cooperation Notice are therefore mirroring the ones set out in section 3 of the State Aid Notice. The Commission, however, will not issue an opinion on whether an aid measure is compatible with the common market, as this falls within its exclusive competence under Article 107 (2) and 107 (3) TFEU.[87]

Both Notices on State Aid and Antitrust set the Commission a target deadline of four month in which to provide the opinion.[88] To increase transparency, the Commission stated that it intended to publish its opinions on Competition DG's website once the judgment in the case in which the opinion was requested has been notified to the Commission pursuant to Article 15 (2) of Regulation No 1/2003, but only to the extent that there is no legal impediment presented by the national procedural rules.[89] To date, there have been only four Commission opinions published in the area of antitrust.[90] There are no publications of opinions in relation to state aid available.

Concerning the scope and procedural aspects of a Commission opinion, both notices are very silent. The next section therefore tries to find clarification on that issue.

---

[82] Antitrust Cooperation Notice, *supra* n 45, para. 29.
[83] *Ibid*, para. 19.
[84] K. Wright, "The European Commission's Own 'Preliminary Reference Procedure' in Competition Cases?", 16(6) (2010) ELJ, p. 744.
[85] State Aid Cooperation Notice, *supra* n 39, para. 78.
[86] *Ibid*.
[87] *Ibid*, para. 92.
[88] *Ibid*, para. 94; Antitrust Cooperation Notice, *supra* n 45, para. 28.
[89] *Ibid*, para. 98; European Commission, Annual Report on Competition Policy 2005, SEC (2006) 761 final, 15 June 2006, at 74, para. 221; Antitrust Cooperation Notice, *supra* n 45, para. 20.
[90] *See*, DG Comp Homepage at: http://ec.europa.eu/competition/court/antitrust_ requests.html (last used: 04.05.2012).

4.1.1 Legal Value of the Opinion

In general Union law, opinions are considered in Article 288 (5) TFEU which sets out a hierarchy of Union legislative acts and states that 'recommendations and opinions shall have *no binding force*'.[91] The former EC Treaty entailed Article 211 (2) which provided that, for 'the proper functioning and development of the common market, the Commission shall […] formulate recommendations or deliver opinions on matters dealt with in this treaty, if it expressly provides or if the Commission considers it necessary'. There is no such provision in the Lisbon Treaty. It appears that principally, opinions are not binding and it is therefore up to the national courts whether to take them into account and to what extent.[92] However, the issue may not be as straight forward as it seems. The Court in its judgement in *Grimaldi* first recognised that recommendations '*cannot in themselves confer rights* on individuals upon which the latter may rely before national courts'.[93] However, it then continued to find that '*the national courts are bound to take recommendations into consideration* in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are *designed to supplement binding Community provisions*'.[94] The Court acknowledged that even though recommendations are not binding, this does not mean that they are legally insignificant.[95] From the Antitrust Cooperation Notice and the State Aid Cooperation Notice, it seems clear that Commission's opinion are intended to supplement Articles 101, 102 TFEU and 107 and 108 TFEU.

The *Grimaldi* judgement, though, does refer to recommendations and not opinions. Even though the Treaty does not differ between opinions and recommendations, it seems from the case law that they differ based on their addressee, content and function. [96] Whereas opinions are 'expressions of opinion from the Commission or the Council *on a certain factual or legal situation*', recommendations are 'invitations to take certain measures, sometimes accompanied by additional provisions of a procedural nature'.[97] While recommendations are suggesting a specific conduct to the addressee, opinions often contain an expert's expression of an opinion.[98] In *Van der Wal*,[99] the Court assimilated the Commission's opinions to expert reports.[100] The Court has held that these opinions are, in their nature merely advice

[91] Emphasis added.
[92] K. Wright, "The European Commission's…", *supra* n 84, p. 744.
[93] Case C-322/88 *Grimaldi* v *Fonds des maladies professionnelles* [1989] ECR 4407, para. 16 (emphasis added).
[94] *Ibid*, para. 18 (emphasis added).
[95] M. Ruffert, "Kommentar zu Artikel 288 AEUV" in C. Calliess; M. Ruffert (eds), *Kommentar zum EUV/AEUV* 2011, para. 95.
[96] K. Wright, "The European Commission's…", *supra* n 84, p. 744.
[97] H. Smit; P. E. Herzog, *The Law of the European Community: A Commentary on the EEC Treaty* (Vol 5 2005), p. 629.
[98] M. Ruffert, "Kommentar zu Artikel 288 AEUV", *supra* n 95, para. 96.
[99] Joined Cases C-174/98 P and C-189/98 P *Gerard van der Wal* v *Commission* [2000] ECR I-1, para. 25.
[100] L. O. Blanco (ed), *supra* n 79, p. 95.

given to undertakings which they are free to take into account or ignore.[101] An opinion does not, unlike a recommendation, function as an alternative to legislation.[102]

To establish whether the Commission opinion may have any binding force or what its scope is, it might be helpful to examine the opinion as an instrument of soft law. Soft law is understood as 'rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effect'.[103] Soft law can become indirectly binding through various forms,[104] for example by virtue of another decision or instrument[105] or if a party invokes it in private litigations[106]. Non-binding instruments can also indirectly possess an obligation, for example through the principle of the protection of legitimate expectations.[107] The parties in the national proceedings may have legitimate expectations as to the content of a Commission opinion issued to the national court.[108] A Commission opinion could also become binding for example if a national judge relies on it in its judgement for interpretation of other obligations or instruments.[109] As pointed out in Chapter 4.1 above, the Cooperation Notices state that a Commission opinion may be sought in cases where regulations, decisions, notices and guidelines do not provide sufficient guidelines. In this context, *Wright* correctly points out that any soft binding force of the Commission opinions is not dependant on these EU instruments and might go beyond them.[110] Based on her research, she also finds that Commission's opinion do not establish rules of conduct in a *constitutive way* but clarify and summarise them in a *declaratory manner*.[111]

Another issue that has been raised is whether the Commission opinion under Regulation 1/2003 (and also opinions in the area of state aid) can be understood as an opinion under Article 288 (5) TFEU. *Wright* argues that the opinion under Regulation 1/2003 is an instrument *sui generis* since there is no other area of Union law where the Commission supports the national courts with an opinion.[112] It does not, however, seem clear why the opinion under Regulation 1/2003 in its legal nature and implications should differ from the opinion as understood in Article 288 (5) TFEU. The same must be

---

[101] Joined Cases 1-57 and 14-57 *Société des usines à tubes de la Sarre* v *High Authority of the ECSC* [1957] ECR 105, p. 115.

[102] L. Senden, *Soft Law in European Community Law*, pp. 161-162 cited in K. Wright, *supra* n 84, p. 745.

[103] F. Snyder, "The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques", 56(1) (1993) *The Modern Law Review*, p. 32.

[104] *See* for general discussion of binding force of soft law in the EU: G.M. Borchardt; K.C. Wellens, "Soft law in European Community law", 14(5) (1989) E.L. Rev., p. 309 *et seq*.

[105] L. Senden, *supra* n 102, p. 236.

[106] F. Snyder, "The Effectiveness of European Community Law…", *supra* n 103, p. 33.

[107] J. Bast, "Legal Instruments and Judicial Protection" in A. von Bogdandy; J. Bast (eds), *Principles of European Constitutional Law* (2010), p. 387.

[108] K. Wright, "The European Commission's…", *supra* n 84, p. 745.

[109] *Ibid*.

[110] K. Wright, "European Commission Opinions to National Courts in Antitrust Cases: Consistent Application and the Judicial-Administrative Relationship", 08-24 (2008) CCP Working Paper, p. 10 *et seq*.

[111] *Ibid*.

[112] K. Wright, "The European Commission's…", *supra* n 84, p. 746.

true for the opinion in the area of state aid and under the State Aid Cooperation Notice.
As to the actual scope of an opinion, guidance can be found in the Court's case in *Van der Wal*[113], where it distinguished two possible types.[114] First, the Commission may limit itself to expressing an opinion of a general nature, independent of the data relating to the case pending before the national court.[115] Secondly, the Commission opinion may also contain legal or economic analyses, drafted on the basis of data supplied by the national court.[116]
In terms of the relationship to the CJEU, it is true that it is not for the Commission to provide authoritative and binding answers to legal questions since this is the prerogative of the Court of Justice.[117] What should not be ignored though, is the fact that the CJEU only replies to questions of law, and since competition law is heavily fact-based, an opinion from the Commission can constitute a useful complement to the Article 267 TFEU procedure, particularly for non-specialised judges.[118] It therefore, under certain circumstances, might be more helpful for a national court to refer to the Commission instead of the CJEU, also taking into account the duration of a preliminary reference procedure.

4.1.2 Cases where the Commission's Opinion was Requested

In 2004, the Commission received nine requests for an opinion – six requests came from Spanish courts.[119] It is however unclear, which of those were received after the modernisation regulation came into force on 1 May 2004. The three other requests came from Belgian courts and were received in December 2004.[120] In 2005, the Commission received requests for an opinion in six cases from national judges – three requests from Belgian courts, one from a Lithuanian court, two from a Spanish court and three further were pending at the end of 2005.[121] In 2006 it issued three opinions – one to a Dutch judge, one to a Belgium judge and one to a Swedish judge was still pending at the end of the year.[122] In 2007, the Commission issued

[113] Joined Cases C-174/98 P and C-189/98 P *Gerard van der Wal* v *Commission*, *supra* n 99, paras. 24-25.
[114] L. O. Blanco, *supra* n 79, p. 93.
[115] Joined Cases C-174/98 P and C-189/98 P *Gerard van der Wal* v *Commission*, *supra* n 99, para. 24.
[116] *Ibid*, para. 25.
[117] E. Paulis, "Coherent Application of EC Competition Rules…", *supra* n 42, p. 406; The Commission does acknowledge that the request for an opinion is without effect on the possibility to refer to the Court for a preliminary ruling, *see*, Antitrust Cooperation Notice, *supra* n 45, para. 27; State Aid Cooperation Notice, *supra* n 39, para. 90.
[118] E. Paulis, "Coherent Application of EC Competition Rules…" *supra* n 42, p. 406.
[119] European Commission, Annual Report on Competition Policy 2004 Vol 1, SEC(2005) 805 final, p. 55 para. 112.
[120] *Ibid*, p. 55 para. 113.
[121] European Commission, Annual Report on Competition Policy 2005, *supra* n 89, p. 73 para. 219.
[122] European Commission, Annual Report on Competition Policy 2006, COM(2007) 358 final, p. 33 para. 70.

three opinions to national judges – two in reply to requests from Swedish courts and one to a Spanish court.[123] For 2008, there are no numbers available, the Annual Report merely states that the Commission received several requests for opinions which were pending at the end of the year. [124] In 2009, the Commission submitted five opinions on requests from national judges from one Belgian court, one Lithuanian court and three Spanish courts.[125] In 2010, the Commission received two requests for an opinion from national courts – from a Spanish and a Belgium judge.[126]
All the before mentioned opinions and the ones shown in Table 1 relate to opinions submitted under antitrust law and Regulation 1/2003. There is no information available with regard to Commission opinions for state aid law. It is not clear, why the Commission has decided to publish opinion submitted in antitrust law but not in state aid law. This demonstrates a lack of transparency.

Table 1. European Commission Responses to National Court Requests for Opinion under Article 15 (1) of Regulation 1/2003[127]

Year	Total number of requests (information and opinion)	Opinion issued by the Commission
2004	6	6
2005	9	6
2006	2	2
2007	3	3
2008	*	*
2009	5	5
2010	2	2
Total	27	24

Table is compiled based on data from following sources: European Commission Annual Reports on Competition Policy 2004-2010
** Since there is no information available, it cannot be excluded that Commission has not submitted any opinions*

4.2 *Amicus Curiae* – Observations

As mentioned before, the Commission's possibility to submit *amicus curiae* briefs to the national courts is only possible for the cooperation in antitrust law but not in state aid law. It is also a genuinely new feature of cooperation that has been introduced by Regulation 1/2003.[128] According to Article 15 (3) of Regulation 1/2003, the Commission, acting on its own initiative,

[123] European Commission, Annual Report on Competition Policy 2007, COM(2008) 368 final, p. 31-32 para. 90.
[124] European Commission, Annual Report on Competition Policy 2008, COM(2009) 374 final, p. 28 para. 115.
[125] European Commission, Annual Report on Competition Policy 2009, COM(2010) 282 final, p. 50 para. 162.
[126] European Commission, Annual Report on Competition Policy 2010, COM(2011) 228 final, p. 37 para. 146.
[127] Table is based on the one from K. Wright, *supra* n 84, p. 750 and has been supplemented.
[128] L. O. Blanco, *supra* n 79, p. 96.

may submit written observations to courts of the Member States, where the coherent application of Articles 101 or 102 of the Treaty so requires. With the permission of the national court in question, the Commission may also make oral observations.[129] The Commission held that it would make *amicus curiae* submissions at appeal stage,[130] where the impact on consistency is likely to be the greatest.[131] Further principles and procedures are set out in the Antitrust Cooperation Notice in paragraphs 31 to 35. The Antitrust Cooperation Notice limits the submission of observations to situations where the coherent application of Articles 101 or 102 TFEU so requires. The Commission will limit its observations to an economic and legal analysis of the facts underlying the case pending before the national court.[132] To enable the Commission to submit useful observations, it may ask the national court to transfer the necessary information and documents to the Commission.[133] Since the Regulation does not provide for a procedural framework for the submission of information, the procedures and rules of the Member States apply.[134] Here, the Antitrust Cooperation Notice emphasises the importance of general principles of Union law.[135] It reinforces in particular the fundamental rights of the parties involved in the case, the principle of effectiveness requiring that the submission of such observations is not excessively difficult or practically impossible and the principle of equivalence entailing that submissions of such observations cannot be more difficult than the submission of observations in court proceedings where equivalent national law is applied.[136] The Notice is, however, silent as to how the national court might make actual use of the Commissions observations, its scope and procedural issues.[137] This shall be analysed further in the next section.

To date, the Commission has published eight *amicus curiae* observations where the national court gave permission to publish them on Competition DG's website.[138]

4.2.1 Legal Nature of *Amicus Curiae* Briefs as an EU Instrument

As already mentioned in Chapter 4.1.1 above, Article 288 (5) TFEU includes opinions and recommendations. I have also established that there is a difference between opinions and recommendations as to their addressee,

[129] National Competition Authorities have the same right to submit observations to the national court (Article 15 (3),(4) Regulation 1/2003).
[130] European Commission, Staff Working Paper: Reform of Regulation 17 – The Proposal for a New Implementing Regulation – Article 16(3) Submissions as Amicus Curiae, SEC (2001) 1827, 13.11.2001, para. 22 cited in K. Wright, "The European Commission's…", *supra* n 84, p. 743 *et seq*.
[131] K. Wright, "The European Commission's…", *supra* n 84, p. 744.
[132] Antitrust Cooperation Notice, *supra* n 45, para. 32.
[133] *Ibid*, para. 33.
[134] *Ibid*, para. 34.
[135] As reaffirmed by Article 10 of the Antitrust Cooperation Notice, *supra* n 45.
[136] *Ibid*, para. 35; Joined Cases 46/87 and 227/88 *Hoechst* [1989] ECR 2859, para. 33.
[137] L. O. Blanco, *supra* n 79, p. 97.
[138] DG Comp Homepage, *supra* n 90.

content and function. Neither the Regulation 1/2003 nor the Antitrust Cooperation Notice use in connection with *amicus curiae* briefs the term opinion or recommendation. They rather refer to it as '*observations*'.[139] This begs the question whether *amicus curiae* observations fall under either of the instruments in Article 288 (5) TFEU or if it is an instrument *sui generis*.[140] To recall, opinions are described as expressions on a certain factual or legal situation, they are compared to an expert expression and are in their nature merely advice.[141] In comparison, recommendations are more invitations to take certain measures; they suggest a specific conduct to the addressee and can function as an alternative to legislation.[142] Opinions are usually adopted in response to the party's initiative whereas recommendations are made on the institutions own initiative.[143] Looking at those definitions, the *amicus curiae* brief seems to fit more under the classification as recommendation since the Commission submits it on its own initiative. What makes it fit uncomfortably, however, is the fact that the Commission refers to it as observation, which from a textual approach seems to be more synonymous with an expression or view on a situation – closer to the understanding of an opinion. However, for the legal implications of the instrument, the exact term of the act is rather subsequent as what matters is the substantive nature of the legal act.[144]

With regard to its scope, one of the purposes of the *amicus curiae* intervention is to alert national judges to decisions in other Member State courts.[145] The Commission has also not excluded, unlike with opinions, that it might address the merits of the case.[146] It has been stated, that the Commission is entitled to make observations related to the dispute and give its legal appraisal of disputes pending before national courts.[147] To recall, the Commission limited its intervention to the purpose to ensure the coherent application of Articles 101 and 102 TFEU.[148]

The first case where the CJEU ruled on the competences of the Commission to submit *amicus curiae* briefs to national courts under Article 15 (3) of Regulation 1/2003 was in *Inspecteur van de Belastingdienst*[149]. The case tested the scope of the *amicus curiae* observations as it was mainly a tax case rather than an Articles 101 or 102 TFEU case – dealing with tax deductibility of profit from a fine imposed as a result of an infringement of

[139] Article 15 (3) Regulation 1/2003 (emphasis added).
[140] This is possible since the enumerations in Article 288 TFEU are not complete. *See*, for that, Schmidt, "Art. 249 EGV" in H. von der Groeben; J. Schwarze, *EUV/EGV* (2003), at para. 43.
[141] *See*, *supra* Chapter 4.1.1.
[142] *Ibid*.
[143] B. Beutler; R. Bieber, *Die Europäische Union: Rechtsordnung und Politik* 2001, pp. 192-193, 199.
[144] M. Kotzur, "Art. 288 AEUV" in R. Geiger; D.-E. Khan; M. Kotzur, *EUV/AEUV* (2010), at para. 27.
[145] European Commission, Staff Working Paper, *supra* n 130.
[146] L. O. Blanco, *supra* n 79, p. 97.
[147] J. H. J. Bourgeois, C. Humpe, "The Commission's draft 'New Regulation 17'", 23(2) (2002) ECLRev., p. 46.
[148] *See*, *supra* Chapter 4.2.
[149] Case C-429/07 *Inspecteur van de Belastingdienst* v *X BV* [2009] ECR I-4833.

EU competition law.[150] The question was whether the Commission can still intervene as *amicus curiae*. The Court held that that the option for the Commission to submit written observations to the national courts 'is subject *to the sole condition* that the coherent application of Articles [101 TFEU] or [102 TFEU] so requires'.[151] The Court found an intrinsic link between the fines and the application of Articles 101 and 102 TFEU and ruled that the Commission's intervention was legitimate.[152] The broad interpretation of Article 15 (3) of Regulation 1/2003 might enable the Commission to intervene where EU competition law overlaps with other areas – what are the limits of EU competition law?[153]

Many of the arguments of how a Commission opinion could become binding,[154] hold equally for the *amicus curiae* observations.[155] In the U. S., the intervention of *amicus curiae* is far more common than in Europe, whereas there they interact more as interested advocates for the parties than as friends to the court with the intention to influence national proceedings.[156] *Kearney* and *Merrill* suggest three different ways of how the national judge can handle *amicus curiae* interventions.[157] In the legal model, the judge resolves a case in accordance with the authoritative sources of law – *amicus curiae* briefs can influence the Court insofar as those briefs have value, both in the sense that they speak to the merits of the legal issue before the Court and provide new information.[158] Under the attitudinal model, the judge decides a case in accordance with their political beliefs and ideological predispositions – *amicus* briefs will have no discernible impact on outcomes in this model.[159] Under the third model, the interest group model, judges will seek to resolve a case with the desires of the organised groups that have an interest in the controversy – neither the legal arguments nor the background information of the *amicus* brief are important to the judge but the fact that the organisation saw fit to file the brief is decisive.[160] The legal model is considered the 'official' model of how judges deal with *amicus* briefs. Submissions by institutional litigants were found to be the most successful in influencing the outcome of a case.[161] Those studies show, that the Commission's *amicus curiae* observations could influence the national judge in its decision making process and thereby influence the outcome of a case. Another 'force' for a national judge might be the possibility of the Commission to open investigations and adopt a subsequent contrary decision. Such possible overlaps will be discussed in Chapter 7 below.

---

[150] K. Wright, "European Commission Interventions as Amicus Curiae in National Competition Cases: The Preliminary Reference in X BV" 30(7) (2009) ECLRev., p. 309.
[151] Case C-429/07 *Inspecteur van de Belastingdienst* v *X BV*, *supra* n 149, para. 30.
[152] *Ibid*, para. 36.
[153] K. Wright, "Commission Interventions as Amicus Curiae…", *supra* n 150, p. 313.
[154] *Supra* Chapter 4.1.1.
[155] K. Wright, *supra* n 84, p. 747.
[156] *Ibid*.
[157] J. D. Kearney; T. W. Merrill, "The Influence of Amicus Curiae Briefs on the Supreme Court", 148(3) (2000) University of Pennsylvania Law Review.
[158] *Ibid*, p. 775 *et seq*.
[159] *Ibid*, p. 779 *et seq*.
[160] *Ibid*, p. 782 *et seq*.
[161] *Ibid*, p. 801 *et seq*.

As there are no contradictory statements in Regulation 1/2003 or the Antitrust Cooperation Notice, it seems that the parties should be allowed to have access to the Commission's observations and be allowed to submit their own observations on the same.[162]

4.2.2 Cases where the Commission Intervened through *Amicus Curiae* Briefs

Since the Regulation 1/2003 came into force and introduced this new mechanism of cooperation, the first Commission interference as *amicus curiae* was in 2006. In 2004 and 2005 the Commission did not have recourse to this device.[163] In 2006, the Commission submitted one *amicus curiae* brief to a French court.[164] In 2007, it submitted one observation in a case in the Netherlands.[165] For 2008, there is no data available.[166] Two further recommendations followed in 2009 – one to a French court and another one to a Dutch court.[167] In the recommendation submitted to the French court, the Commission suggested to the national court to refer the issue for further clearance to the CJEU in a preliminary reference procedure, which it did. In the Dutch case, the Court of Appeal of Amsterdam confirmed the line suggested by the observations submitted by the Commission. In 2010, the Commission submitted recommendations in three cases – one to an Irish court, one to a Slovakian court and one to a Dutch court.[168] The case with the Irish court had been withdrawn. There is no information in English available, as to what the outcome was in the other two cases. In 2011, the Commission intervened twice as *amicus curiae* – in a French and UK court proceeding.[169] The French Supreme Court followed the interpretation put forward by the Commission in its *amicus curiae* observation.

Quantitatively, the Commission has intervened in national court proceedings as *amicus curiae* so far only in a limited number of cases. This could be an indication that it focuses on the important cases. The few amounts of proceedings it interfered with could also result from the fact that it was not aware of the other proceedings at the national courts. In its staff working paper on *amicus curiae* briefs, the Commission stated that it would become aware of a case either through the ECN, or where a national court has

[162] L. O. Blanco, *supra* n 79, p. 97.
[163] European Commission, Annual Report on Competition Policy 2004, *supra* n 119, p. 56 para. 115; European Commission, Annual Report on Competition Policy 2005, *supra* n 89, p. 74 para. 223.
[164] European Commission, Annual Report on Competition Policy 2006, *supra* n 122, p. 33 para. 72.
[165] European Commission, Annual Report on Competition Policy 2007, *supra* n 123, p. 32 para. 92.
[166] European Commission, Annual Report on Competition Policy 2008, *supra* n 124, p. 28 para. 115.
[167] European Commission, Annual Report on Competition Policy 2009, *supra* n 125, p. 50 para. 162.
[168] European Commission, Annual Report on Competition Policy 2010, *supra* n 126, p. 38 para. 147.
[169] Available at DG Comp Homepage, *supra* n 90.

submitted a copy of the first instance decision to it – as required under Article 15 (2) of Regulation 1/2003.[170] The multitude of languages in the Union may be another reason why the Commission interferences remain exceptional.[171]
Qualitatively, what would be important to research is the reason why the Commission intervened as *amicus curiae*, the nature of the advice submitted to the national court and how and if the latter followed the Commission's advice in its judgement. The Commission has published (or will provide the missing information as soon as possible) eight out of the nine observations and following national court judgements on its homepage. However, researching those in detail goes beyond this thesis.

Table 2. European Commission Interventions as Amicus Curiae

Year	No of *Amicus Curiae* Interventions
2004	0
2005	0
2006	1
2007	1
2008	*
2009	2
2010	3
2011	2
Total	9

Table compiled based on data from following sources: European Commission Annual Reports on Competition Policy 2004-2010 and information available at http://ec.europa.eu/competition/court/antitrust_requests.html (last used: 08.05.2012)
** Since there is no information available, it cannot be excluded that Commission has not submitted any amicus curiae observations or that the national court didn't follow it*

4.3 Transfer of Information and Assistance of National Courts

For antitrust law, Article 15 (1) of Regulation 1/2003 provides that a national court may ask the Commission to transmit to it information in its possession concerning the application of the Union competition rules. Further information on the transfer of information can be found in the Antitrust Cooperation Notice in paragraphs 21 to 27. With regard to state aid law, information on the transfer of information can be found in section 3.1 of the Commission Notice on State Aid. Since the rules set out for both – antitrust and state aid law – in their respective Notices are generally corresponding, they will be described together.
The type of information a national court might request from the Commission can be divided into two categories. The first category comprises information of a procedural nature to, *inter alia*, enable the

[170] *See*, *supra* n 130.
[171] L. O. Blanco, *supra* n 79, p. 98.

national court to discover whether a certain case is pending before the Commission, whether the Commission has initiated a procedure or whether it has already taken a position.[172] A national court may also ask the Commission when a decision is likely to be taken or to give an estimation of how much time is likely to be required before it takes a decision. This may be useful to determine the conditions for any decision to stay proceedings or whether interim measures need to be adopted.[173] The second category refers to factual information from the Commission and documents in its possession such as copies of existing Commission decisions (if they are not already published on the Commission's website), factual data, statistics, market studies and economic analysis.[174] In its case law, the CJEU also refers to '*economic and legal information*' which that institution may be able to supply.[175] The transmission of documents to national courts may also include documents relating to the position or conduct of the parties, such as statement of objections.[176] The CJEU's ruling in *Postbank* may also suggest that documents also includes documents obtained in proceedings between parties other than the parties to the Commission's proceedings from which such documents originate.[177]

The Cooperation Notices also reiterate the principle established by the Union Court's concerning the obligation to comply with professional secrecy, covering both – confidential information and business secrets.[178] However, according to Articles 4 (3) TEU and 339 TFEU this does not lead to an absolute prohibition for the Commission to transmit to national courts information covered by professional secrecy.[179] As confirmed by the Union courts, the duty of loyal cooperation requires the Commission to provide the national court with whatever information the latter may seek, including information covered by the obligation of professional secrecy.[180] The transmission of confidential information is, however, subject to two conditions. Firstly, the national court has to guarantee that it will comply with its obligation under Union law to uphold the rights, which Article 339 TFEU confers on natural and legal persons, and protect the confidential information and business secrets.[181] Secondly, the Commission has to adopt precautions to ensure that the right of the undertaking concerned is not undermined by, *inter alia*, indicating those parts which are covered by professional secrecy and which parts are not and can therefore be

[172] Antitrust Cooperation Notice, *supra* n 45, para. 21; State Aid Cooperation Notice, *supra* n 39, para. 83(a).
[173] *Ibid*.
[174] *Ibid*, para. 21; State Aid Cooperation Notice, *supra* n 39 para. 83(b).
[175] Case C-234/89 *Delimitis*, *supra* note 44, para. 53; Joined Cases C-319/93, C-40/94 and C-224/94 *Dijkstra*, *supra* note 80, para. 34 (emphasis added).
[176] L. O. Blanco, *supra* n 79, p. 88 with reference to the Case T-353/94 *Postbank* [1996] ECR II-921.
[177] *Ibid*.
[178] Antitrust Cooperation Notice, *supra* n 45, para. 23; State Aid Cooperation Notice, *supra* n 39, para. 85.
[179] *Ibid*, para. 24; State Aid Cooperation Notice, *supra* n 39, para. 86.
[180] *Ibid*; Case T-353/94, *supra* n 176, para. 64; Case C-2/88 *Zwartveld and Others*, *supra* n 58, paras. 16-22.
[181] *Ibid*, para. 25; State Aid Cooperation Notice, *supra* n 39, para. 87.

disclosed.[182]
The Commission may refuse the transmission of confidential information in two situations:
First, the Commission can refuse the transmission of such information, where the national court fails to offer a guarantee that it will protect the confidential information or business secrets.[183] This might be the case if the national court is obliged under its national legislation to disclose the information to the parties.[184]
Second, the Court has held that a refusal to provide such information is justified to avoid any interference with the functioning and independence of the Union or to safeguard its interests.[185]
According to the notices, the Commission will endeavour to provide the national court with the requested information within one month from the date it receives the request.[186]
As to the duties of the national courts, they may facilitate the role of the Commission in the enforcement of EU competition rules, by, *inter alia*, transmitting to the Commission all judgements applying Articles 101 and 102 TFEU,[187] transmitting all the necessary documents requested by the Commission in case of an *amicus curiae* intervention[188] and assistance in the context of a Commission inspection under the Regulation on Procedure[189].

4.4 Evaluation

It is disappointing that the Commission has not provided more information as to the procedure, scope and content of its opinion and *amicus curiae* observations as they are far from clear. Legally, the opinion and the *amicus curiae* brief, as instruments in the meaning of Article 288 (5) TFEU, are not binding. An indirect binding force could nevertheless occur through the national courts judgement, if it follows the Commission's suggestions. Also the fact that the Commission can open investigations itself and could release a contradicting decision could strengthen the binding effect of its 'soft law' instruments. Where the national judge can decide to request an opinion or not from the Commission, the latter can interference as *amicus curiae* on its own motion, which provides the Commission with a far-reaching instrument that can decisively influence the outcome of a case. Especially the submissions of opinion and *amicus curiae* briefs by the Commission can

[182] *Ibid*; L. O. Blanco, *supra* n 79, p. 89.
[183] *Ibid*.
[184] I. van Bael; J.-F. Bellis, *Competition Law of the European Community* (2010), p. 1248; L. O. Blanco, *supra* n 79, p. 90.
[185] Case C-275/00 *Commission* v *First NV and Franex NV* [2002] ECR I-10943, para. 49; *See*, to that effect, Case 2/88 *Zwartveld and Others*, *supra* note 58, paras. 24, 25; Case C 234/89 *Delimitis*, *supra* n 44, para. 53; Case C-39/94 *SFEI and Others*, *supra* n 65, para. 50.
[186] Antitrust Cooperation Notice, *supra* n 45, para. 22; State Aid Cooperation Notice, *supra* n 39, para. 84.
[187] Article 15 (2) of Regulation 1/2003; Antitrust Cooperation Notice, *supra* n 45, para. 37.
[188] Article 15 (3) of Regulation 1/2003.
[189] Antitrust Cooperation Notice, *supra* n 45, paras. 38-41.

have great influence on the proceedings in the national courts. If a national judge has a different opinion as the one submitted to it by the Commission in its opinion or *amicus curiae* observation, the interpretation of EU law by the national court is then not 'so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved'.[190] The national judge then may have the obligation to refer the issue to the CJEU for a preliminary ruling.

The necessity of the introduction of the *amicus curiae* mechanism had been questioned, as the full application Articles 101 and 102 TFEU would not suddenly increase the number of cases that it would require an additional tool to ensure the uniform application.[191] *Bourgeois* and *Humpe* convincingly prompt the question why competition law should be singled out for special treatment since the national courts apply a wide range of Union law provisions and can in case of doubt always refer to the CJEU for a preliminary ruling.[192] It has also been suggested that it would have been more logical to simply provide that the Commission intervenes under applicable national law as party with a sufficient interest, where issues of Union competition law have arisen in the proceedings.[193] This would enable the Commission to apply for leave to intervene in accordance with national law and to subsequently make their submission in accordance with applicable national rules.[194]

With regard to decentralisation, the Commission has reserved itself a strong backdoor through which it can influence the policy and harmonised application of Union competition rules. This does not directly 'cut' the national judges competences, but they might feel indirectly obliged to follow the standards of the Commission. The praised decentralisation of competition law may not be as straight forward as it seemed. The effect of Commission decisions on national courts adds another crack to the decentralisation, which will be analysed in the following chapter.

[190] Case 283/81 *CILFIT* [1982] ECR 3415, para. 16.
[191] J. H. J. Bourgeois; C. Humpe, "The Commission's 'New Regulation 17'", *supra* n 147, p. 46.
[192] *Ibid*.
[193] H. M. Gilliams, "Modernisation: From Policy to Practice", 28(4) (2003) ELRev., p. 462.
[194] *Ibid*.

5 (Binding) Effect of a Commission Decision

The previous chapter has described the mechanisms for cooperation between the Commission and national courts. However, there is another element that has significant influence on the court proceedings. As described in chapter 3.1 above, due to the concurrent power of enforcement of antitrust rules between the Commission and the national courts, the latter may not adopt judgements that run counter to Commission decisions when applying Articles 101 and 102 TFEU. This raises the question whether there is a hierarchal relationship between the Commission decision and national court judgements and if this is still in line with the principle of subsidiarity and decentralisation. The main question is, if there is a supremacy of Union over national proceedings.

5.1 Article 16 of Regulation 1/2003 as Expression of a Union Instrument

Article 16 (1) of Regulation 1/2003, which is headlined 'Uniform Application of Community Competition Law', comprises a negative obligation of national courts not to contradict an already existing Commission decision dealing with the subject before it.[195] Article 16 (1) requires furthermore that they must also avoid issuing decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated.[196] To that effect, the national court may assess whether it is necessary to stay its proceedings. This substantive provision on the cooperation is complemented by the procedural provision in Article 15 of Regulation 1/2003 giving, *inter alia*, Member States the possibility to request information or an opinion from the Commission.
The principle set out in Article 16 (1) of Regulation 1/2003 is a codification of the ECJ's case law on contradictory decisions in European antitrust law. The Court has in a steady process developed its approach towards the binding nature of Commission decisions. Whereas in the 1970s, 1980s and 1990s the Courts approach was more reserved, as it 'invited' national courts to stay their proceedings and await the pending Commission decision in order to avoid possible conflicts.[197] The court gradually developed its language from what was something rather desirable to something comparable to a duty to stay proceedings.[198] More on that in Chapter 7.2.

[195] See also Case T-289/01 *Der grüne Punkt* [2007] ECR II-1691, para. 197.
[196] See also Case C-418/01 *IMS Health* [2004] ECR I-5039, para. 19.
[197] A. P. Komninos, "Effect of Commission Decisions on Private Antitrust Litigation: Setting the Story Straight", 44(5) (2007) CMLRev., p. 1388.
[198] *Ibid*.

5.1.1 Delimitis

Without a link to the questions referred to it by the national court,[199] the ECJ addressed in an *obiter dictum* in *Delimitis*[200] the issue of parallel competences and the risk of contradicting decisions in the application of Union competition rules. The Court explains that the Commission has the sole responsibility for the implementation and orientation of Union competition policy. It shares, however, its power to apply Articles 101 and 102 TFEU with the national courts, which raises the risk of contradicting decisions. The Court then finds that 'such conflicting decisions would be contrary to the general principle of legal certainty and must, therefore, be avoided when national courts give decisions on agreements or practices which may subsequently be the subject of a decision by the Commission.' Following, the Court provides some guidelines for the national courts on how to deal with this issue. A national court may continue the proceedings and rule on the agreement in issue, if the conditions for the application of Article 101 (1) TFEU are clearly not satisfied and there is, consequently, scarcely any risk of the Commission taking a different decision.[201] The same would be true, if an agreement's incompatibility with Article 101(1) TFEU is beyond doubt and it may on no account be the subject of an exemption decision under Article 101 (3) TFEU. However, what should be borne in mind here is that since the *Delimitis* judgement national courts themselves can apply Article 101 (3) TFEU. In any case, a national court may decide to stay the proceedings or to adopt interim measures pursuant to its national rules of procedure, this should be especially envisaged where there is a risk of conflicting decisions in the context of the application of Articles 101 and 102 TFEU. Some authors argued that such a binding force of a Commission decision for national courts is incompatible with Union law.[202] *Ehlermann* even argued that it is obvious that judges and national courts 'can neither *cooperate* nor be *coordinated* when applying Article [101]' TFEU.[203] About the possibility for the Commission to bind a national court, *Marenco* expressed the concern that it would be against the division of powers.[204]

---

[199] W. Durner, "Die Unabhängigkeit nationaler Richter im Binnenmarkt – zu den Loyalitätspflichten nationaler Gerichte gegenüber der EG-Kommission, insbesondere auf dem Gebiet des Kartellrechts", (2004) EuR, p. 554.

[200] Case C-234/89 *Delimitis*, *supra* n 44; for a presentation of the case *see*, e. g., M. Levitt, "Delimitis and De Minimis" (case note), 15(5) (1994) ECLRev.

[201] *Ibid*, paras. 43-52.

[202] C. Jones; E. Sharpston, "Beyond Delimitis: Pluralism, Illusions, and Narrow Constructionism in Community Antitrust Litigation", 3 (1996-97) CJEL, pp. 92-93; further references *see*, A. P. Komninos, "Effect of Commission Decisions…", *supra* n 197, p. 1391 (footnote 18).

[203] C.-D. Ehlermann, "The modernisation of EC Antitrust Policy: A Legal and Cultural Revolution", 37(3) (2000) CMLRev., pp. 580-581 (emphasis added).

[204] G. Marenco, "Does a Legal Exemption System Require an Amendment by the Treaty?" in C.-D. Ehlermann; I. Atansiu (eds), *European Competition Law Annual 2000* …, *supra* n 42, p. 27.

5.1.2 Masterfoods

In 2000, 10 years after the *Delimitis* decision, the Court had another chance to rule on the issue of shared competences between the Commission and the national courts in the application of Article 101 TFEU in the case *Masterfoods.*[205] This time, the discussions on the modernisation of European competition were in full swing, after the Commission had published its White paper the year before. *Masterfoods* came at the right time for the Commission, supporting its drive towards decentralisation and paving the way towards a more Union-friendly solution to this problem in the negotiations leading to the adoption of Regulation 1/2003.[206]
In *Masterfoods*, the Court ruled that, the duty of national courts to fulfil the obligations arising from the Treaties and to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty is based in the case law of the Court that the duty arising from the principle of sincere cooperation under Article 4 (3) TEU.[207] The Court furthermore points out the binding effect of a decision, codified in Article 288 (4) TFEU. The Court reminds that already *Delimitis* clarified that in order not to breach the general principle of legal certainty, national courts must avoid giving decisions, which would conflict with a decision contemplated by the Commission. Even more, national courts cannot take decisions running counter to an already existing Commission decision, even if the latter's decision conflicts with a decision given by a national court of first instance.[208] The Court stresses that a national court in case of doubt may, or must, in accordance with Article 267 TFEU, refer a question to the Court of Justice for a preliminary ruling. If the addressee of a Commission decision has already brought an action for annulment of that decision, the national court may stay proceedings until a definitive decision has been given.[209]
However, the Court points out that avoiding contradicting decisions is not a mutual obligation. Whereas national courts can be bound by a Commission decision, the Commission cannot be bound by a decision given by a national court in application of Articles 101 and 102 TFEU. The Commission is rather entitled to adopt at any time individual decisions even if the decision contemplated by the Commission conflicts with that of a national court's decision.[210]

5.1.3 Binding Effect of Administrative Decisisons in Union Law

What can be seen in those judgements from the ECJ is, that the obligation of

[205] Case C-344/98 *Masterfoods* [2000] ECR I-11369; for a presentation of the case *see*, e. g. S. Preece, "Masterfoods v. HB Ice Cream Ltd.", 22(7) (2001) ECLR.
[206] A. P. Komninos, "New Prospects for Private Enforcement of EC Competition Law: Courage v. Crehan and the Community Right to Damages", 39(3) (2002) CMLRev., pp. 446-447.
[207] Case C-344/98 *Masterfoods*, *supra* note 205, para. 49.
[208] *Ibid*, paras. 50-52.
[209] *Ibid*, paras. 54-55.
[210] *Ibid*, para. 48.

national courts not to contradict a Commission decision is a principle not newly established in Article 16 of Regulation 1/2003 but rather resulting from general principles of Union law. Since the Court bases the central role of the Commission on general rules, the judgements are, even though both are from the time before the modernisation of antitrust law, unaffected by it.[211]

In *Delimitis* the Court relied on the general principle of legal certainty. However, the Court in *Masterfoods* did not rely on that argument anymore, with good according to *Durner*. He argues that a binding nature could not be carried by the principle of legal certainty.[212] It seems however, that the duty to avoid contradicting decisions in Regulation 1/2003 is also based on the compliance with the principle of legal certainty and uniform application of Union rules.[213] In *Masterfoods* the Court mainly relied on the principle of loyalty and the duty of sincere cooperation in Article 4 (3) TEU which, as a general principle, has to be interpreted by the Court.[214] As this principle generates duties shaping the manifold relationships between public authorities in the European legal order,[215] it is as a legal basis more appropriate and resistant to dogmatic criticism.[216] When supervising compliance with the competition rules, the Commission addresses the undertakings and Member States concerned by decisions.[217]

5.2 Positive Binding Effect or Negative Duty not to Contradict?

In its reasoning in *Masterfoods*, the Court based its reasoning not only on Article 4 (3) TEU but also on Article 288 (4) TFEU and the general binding effect of decisions in Union law.[218] This prompts the question if there is actually a positive binding effect of Commission decision on national courts or only a negative duty to avoid contradicting decisions. Another question that comes to mind is, if there is essentially a difference between a positive or negative binding effect.

First, Article 16 of Regulation 1/2003 is worded in a way that national courts 'cannot take decisions *running counter* to the decision adopted by the Commission' and 'must also *avoid decisions* which would conflict with a decision contemplated by the Commission'.[219] This wording is indicative of a negative binding effect. In *Masterfoods*, the Court also avoided using the

[211] L. Kjølbye, "Case C-344/98 Masterfoods" (case note), 39(1) (2002) CMLRev., pp. 177-178.
[212] W. Durner, "Die Unabhängigkeit nationaler Richter... ", *supra* n 199, p. 561.
[213] Regulation 1/2003, Recital 22.
[214] A. von Bogdandy; J. Bast, "The European Union's Vertical Legal Order of Competences: The Current Law and Proposals for its Reform", 39(2) (2002) CMLRev., p. 263.
[215] A. von Bogdandy; J. Bast, *supra* n 107, p. 41.
[216] W. Durner, "Die Unabhängigkeit nationaler Richter... ", *supra* n 199, p. 561.
[217] Article 105(2) and 106(3) TFEU; The Treaty also requires the Commission to use a decision as a normative instrument in Article 95 (4) and 96 (2) TFEU; K. Lenaerts; P. Van Nuffel, *European Union Law* (2011), p. 917.
[218] Case C-344/98 *Masterfoods*, *supra* note 205, para. 50.
[219] Emphasis added.

term 'binding', instead adopting the same language found in Article 16 of Regulation 1/2003 as 'they cannot take decisions *running counter* to that of the Commission'.[220]

The consensus seems to be, that there is a difference when the Commission exercises its power in the field of exclusive competence or in the area of shared competence. A Commission decision in the former situation has a positive binding effect, which was the case with constitutive decisions under ex Article 81 (3) EC under the previous system of enforcement.[221] The Court confirmed this view when it dealt for the first time with the nature and effects of Commission decisions in *Banks*[222], which concerned the application of the ECSC Treaty[223]. The Court held that Commission decisions were binding on the national courts due to the Commission's sole jurisdiction to apply the provisions in question.[224] This is still the case with Commission decisions withdrawing the benefit of a block exemption regulation under the current system of enforcement.[225] Due to its *erga omnes* effects, such constitutive decision can be opposed to all third parties and thus create a high potential for conflict with prohibition decisions adopted by other decision-makers in a system of parallel competencies.[226] In order to avoid frequently diverging decisions creating conflicting rights and obligations, it was important not to include such type of decisions in the Regulation 1/2003.[227]

The issue is less clear in the situation of shared competences between national courts and the Commission. There are a variety of circumstances in which the Commission may issue decisions, which adds to the confusion about which of those decisions are binding. The Commission's decision making powers are set out in Chapter III and IV of Regulation 1/2003, its three main instruments being decisions ordering termination of infringement (Article 7), imposing fines (Article 23 (1) (a)), and making commitments binding (Article 9).[228] The binding effects of a decision depend on the nature of the decision.[229] The General Court ruled in the case *First Data Corp*[230] on the negative effect of Commission applicability or inapplicability decisions (now under Article 10 of Regulation 1/2003). The General Court stated that negative clearance does not bind the national courts, as it means only, for the Commission, on the basis of the facts in its possession, that there is no need to intervene. Negative clearance does not constitute a

---

[220] Case C-344/98 *Masterfoods*, *supra* note 205, para. 52 (emphasis added).
[221] R. Nazzini, *Concurrent Proceedings in Competition Law* (2004), p. 177; A. P. Komninos, "Effect of Commission Decisions…", *supra* n 197, p. 1393; W. Durner, "Die Unabhängigkeit der nationalen Richter... ", *supra* n 199, p. 559.
[222] Case C-128/92 *HJ Banks & Co Ltd* v *British Coal Corp* [1994] ECR I-1209.
[223] Treaty establishing the European Coal and Steel Community.
[224] Case C-128/92 *Banks*, *supra* note 224, para. 23; for further discussion on this see R. Nazzini, *supra* n 221, pp. 176-180.
[225] A. P. Komninos, "Effect of Commission Decisions…", *supra* n 197, pp. 1393-1394.
[226] E. Paulis, "Coherent Application of EC Competition Rules…", *supra* n 42, p. 408.
[227] *Ibid*, pp. 408 *et seq*.
[228] W. P. J. Wils, "EU Antitrust Enforcement Powers and Procedural Rights and Guarantees", 34(2) (2011) WC, p. 193.
[229] E. Paulis, "Coherent Application of EC Competition Rules…", *supra* note 42, p, 423.
[230] Case T-28/02 *First Data Corp., FDR Ltd and First Data Merchant Services Corp*. v *EC Commission* [2005] ECR II-4119.

definitive assessment, nor in particular the adoption of a position which falls within the exclusive competence of the Commission.[231] In other words, the decision is not binding because it is only of declaratory nature. *Durner* argues that also decisions of the Commission under Article 101 (3) TFEU are of declaratory nature as they only confirm the current legal situation and are hence not binding for national courts. This is, however, not confirmed by the reading of *Masterfoods* and Article 16 of Regulation 1/2003, which create a binding duty of Commission decisions in their entirety for national courts, so *Durner*. *Paulis* already inferred from the *Delimitis* judgment that national courts have an obligation not to adopt decisions applying Union competition law that would be contrary to an existing or contemplated Commission decision.[232] *O'Keefee* reads from *Masterfoods* a hierarchy of Treaty provisions in that the national courts obligation under Article 4 (3) TEU trumps its application of Articles 101 and 102 TFEU.[233]

Komninos however argues that the ECJ in *Masterfoods* acknowledged that, at the end of the day, national courts could not, strictly speaking, be positively bound by a Commission decision directly, but only indirectly through the Court of Justice, to which they could always have access by means of the preliminary reference procedure. *Komninos* relies here on the paragraph of the judgement where the Court held that a national court is not bound by a Commission decision, which is being challenged before the Union Courts, but may decide to stay proceedings.[234]

It seems that, even though the reasoning is slightly different, *Durner* and *Komninos* both advocate that Commission decisions, in principal, cannot and should not be positively binding on national courts. Where they differ is in their reading of *Masterfoods* and Article 16 of Regulation 1/2003. Whereas *Durner* reads a positive binding effect of Commission decisions in their entirety, which could be supported by paragraph 8 and 13 of the Commission Notice, also speaking of a binding effect of Commission decision. *Komninos* rather comes to the conclusion that the supranational nature of the Union legal system requires that national courts should not compromise the supremacy and uniformity of Union law by taking decisions which are incompatible with those adopted by the Commission.[235] This negative duty of abstention means that national courts should always seize the CJEU if they intend to contradict a Commission decision.[236]

Now to the difference between a positive binding effect and a negative duty not to contradict. A positive binding decision would mean for a national court an obligation to follow a Union solution, finding an infringement or the determination of the issues of law and fact. This is not the same as a negative duty not to contradict a Commission decision, which is based on the rationale to ensure that there are no national decisions, which challenge a Union measure.[237]

---

[231] *Ibid*, para. 50.
[232] E. Paulis, "Coherent Application of EC Competition Rules…", *supra* n 42, p. 420.
[233] S. O'Keeffe, "First Among Equals: The Commission and the National Courts as Enforcers of E.C. Competition Law", 26(3) (2001) E.L.Rev. p. 306.
[234] Case C-344/98 *Masterfoods*, *supra* note 205, para. 53.
[235] A. P. Komninos, "Effect of Commission Decisions…", *supra* n 197, p. 1395.
[236] *Ibid*, p. 1395.
[237] A. P. Komninos, "Modernisation and Decentralisation: Retrospective and Prospective"

5.3 When is there a Conflict?

The issue about a negative or positive binding effect is not the only ambiguity. Regulation 1/2003 does also not define when there is a 'conflict' of decisions or, in other words, it does not state what the scope of the rule of Article 16 (1) of Regulation 1/2003 is. It is not clear whether Commission decisions are binding as to the operative part of a Commission decision or also as to its reasoning. There is a difference as to the scope of the binding effect of a Commission decision. If Commission decisions were binding only as to their operative part, this would only involve situations where the objects and facts of the case before the Commission were *identical* with those before the national court and the judgement of the national court would be incompatible with the Commission decision.[238] If, however, Commission decisions are binding also as to their reasoning, already a *similarity* between the facts and inconsistency between the reasoning of the Commission and national court would ensue a conflict.[239] In certain situations, a decision may also have direct effect for individuals.[240]

Some clarification might be found in the Antitrust Cooperation Notice, which stipulates that the application of Articles 101 and 102 TFEU by the Commission in '*a specific case*' binds the national courts when they apply Union competition rules '*in the same case in parallel*' with or subsequent to the Commission.[241] This seems to indicate a binding effect only as to the operative part. This is supported by the Commission's explanatory memorandum to Article 16 of Regulation 1/2003 as 'the potential for conflict *depends on the operative part* of the Commission decision and the facts on which it is based'.[242]

Another source for clarification might be the case law of the Court. Unfortunately, the *Masterfoods* case did not bring any further clarification to whether the administrative decision is binding as to issues of law, fact, or mixed law and fact.[243] The Court did rely on Article 288 (4) TFEU which states that a decision which specifies those to whom it is addressed shall be binding only on them. It does not seem clear, why a national court should rely on a Commission decision that is addressed to a party, which is not the same before it.[244] Even though the Court did not address this issue, Advocate General *Cosmas* in his opinion in *Masterfoods* did. He finds that merely a connection between a legal problem before a national court and one being examined by the Commission is not in itself sufficient to find a conflict. There is no risk of conflict as long as the proceedings dealt with by

---

in G. Amato; C.-D. Ehlermann, *EC Competition Law – A Critical Assessment* (2007), p. 659.

[238] A. P. Komninos, "Effect of Commission Decisions…", *supra* n 197, p. 1397.

[239] *Ibid*, p. 1397.

[240] K. Lenaerts; P. Van Nuffel, *supra* n 217, p. 917.

[241] Antitrust Cooperation Notice, *supra* n 45, para. 8.

[242] Proposal for a Council Regulation on the Implementation of the Rules on Competition laid down in Articles 81 and 82 of the Treaty, COM(2000) 582 final, p. 24.

[243] R. Nazzini, *supra* n 221, p.174.

[244] A. P. Komninos, "Effect of Commission Decisions…", *supra* n 197, p. 1401.

the Commission and the national court are not '*completely identical'*.[245] He argues that a conflict 'only arises when the binding authority which the decision of the national court will have *conflicts with the grounds and operative part* of the Commission's decision'.[246] *Cosmas* argues for a narrow interpretation of conflict, as any more broad interpretation would result in the national court being overly bound.[247] 'Grounds' could include findings of fact, open to reconsideration by the national judge.[248]
The discussion between the broad and narrow reading of conflict is the issue in a case before the UK courts, *Inntrepreneur* v *Crehan*[249]. The High Court had to decide on the issue whether a party to an agreement could claim damages in case of harm caused by the breach of Union antitrust rules. The case was also referred to the CJEU under an Article 267 TFEU procedure, where it dealt with in *Courage* v *Crehan*[250], but only with the substantive part, as no procedural questions had been referred to it. In the UK, the High Court ruled that there was no infringement of Article 101 (1) TFEU. More relevant here, it found that it is not bound by Commission's decisions in three cases[251] that addressed exactly the same factual and legal issue but in relation to agreements between other parties.[252] The case was then appealed at the Court of Appeal, which agreed that Commission decisions are not legally binding on parties other than the addressees. However, it also found that the High Court failed to take into account the duty under Article 4 (3) TEU and principle of full effectiveness of Union law to avoid contradicting decisions, which required the national courts to follow the Commission's decisions.[253] The Court of Appeal supported its view also with the argument that the Commission is carrying out detailed research investigation that the national judge cannot possibly embark on himself and to do so would be inconsistent with the role of a judge in civil litigation in this jurisdiction.[254] The ruling of the Court of Appeal has been widely applauded as a 'victory' for the aims of uniformity and legal certainty in the application of Community competition law before national courts.[255] Another concern was that the case posed a potential threat to the objectives of legal certainty and

[245] Opinion of Mr Advocate General Cosmas delivered on 16 May 2000 in Case C-344/98 *Masterfoods*, *supra* note 205, para. 16.
[246] *Ibid*, para. 15 (emphasis added).
[247] *Ibid*.
[248] K. Wright, "The European Commission's…", *supra* n 84, p. 740.
[249] Case *Inntrepreneur Pub Co CPC* v *Crehan* [2006] UKHL 38, [2004] EWCA Civ 637 (in the following referred to as Crehan).
[250] Case C-453/99 *Courage Ltd* v *Crehan*, *supra* note 51 (in the following referred to as Courage).
[251] Commission Decision 99/474/EC of 16 June 1999 *Scottish & Newcastle* [1999] OJ L186/28; Commission Decision 1999/473/EC of 16 June 1999 *Bass Holding Ltd, Bass Lease* [1999] OJ L186/1; Commission Decision 99/230/EC of 24 Feb. 1999 *Whitbread* [1999] OJ L88/26.
[252] R. Nazzini, *supra* n 221, p. 193.
[253] *Ibid*, p. 194.
[254] Case *Bernard Crehan and Inntrepreneur Pub Company CPC* [2004] EWCA Civ 637, para. 76.
[255] A. Andreangeli, "Courage Ltd v Crehan and the Enforcement of Article 81 EC before the National Courts", 25(12) (2004) ECLRev., p. 762-763; *See* R. Nazzini; M. Andenas, "Awarding Damages for Breach of Competition Law in English Courts – *Crehan* in the Court of Appeal", 17(4) (2006) EBLRev., pp. 1208-1210.

consistency in the 'decentralised' application of competition law.[256]
This was however still not the end of the story and the House of Lords overturned the Court of Appeal's finding and restored the High Court's judgement. The House of Lords referred to the CJEU's case law on conflicting decisions and followed Advocate General *Cosmas*' opinion in *Masterfoods*, finding that there were no congruities between the facts and parties of the Commission cases and the case at hand and hence no conflict.[257] According to the House of Lords, a Commission decision 'is *simply evidence* properly admissible before the English court which, given the expertise of the Commission, may well be regarded by that court as highly persuasive'.[258] The perception of the House of Lords judgement has been met with both criticism[259] and praise. It might be true that the Court of Appeal's approach was more community friendly, but the House of Lords approach seems to be more in line with the Union rules and jurisdiction concerning concurrent proceedings before national courts.[260] It seems that a narrow reading of what is to be understood as 'conflict' is preferential and more likely than a broad interpretation.

5.4 Evaluation

Are the Commission decisions binding for national courts? Is there supremacy of Commission over national proceedings and if so what is its scope? Can we still speak about a decentralisation? The above discussions show, that the situation is far from clear. Before the modernisation of antitrust law, legal scholars have often argued, that there is a binding effect of Commission decisions only where it has exclusive competence but none at all where there is shared competence. It seems hard to uphold this position since the modernisation of the enforcement of Articles 101 and 102 TFEU is now fully shared between the Commission and the national courts. If one would continue the argumentation, this would mean that none of the decisions are binding for national courts, but this is not what Article 16 of Regulation 1/2003 seems to intend. The situation after the modernisation is now more complex and even less clear.
The Court's judgement in *Masterfoods* reaffirmed the central importance of the Commission within the competition system and the subservient position of the national courts, which must wait for Union proceedings to be completed before they can deal effectively with a case.[261] The only option which appeared to be open to a national court is to stay proceedings, and await the finalization of the Union proceedings, or to make a reference to

[256] *Ibid*, p. 758.
[257] Case *Crehan*, *supra* n 249, paras. 54-56.
[258] *Ibid*, para. 69.
[259] *See*, e. g., T. Petch, "Relying on Commission Decisions", 123(Apr) (2007) LQR, pp. 191-192.
[260] A. Andreangeli, "The Enforcement of Article 81 EC Treaty before National Courts after the House of Lords' Decision in Inntrepreneur Pub Co Ltd v Crehan", 32(2) (2007) E.L.Rev., pp. 267-268; For a positive assessment *see also*, A. P. Komninos, "Effect of Commission Decisions…", *supra* n 197 , pp. 1403-1404.
[261] K. Middleton, *supra* n 24, pp. 111-112.

the Court of Justice under Article 267 TFEU – both of these are unsatisfactory because of their inherent delay.[262] As long as a Commission decision has not been challenged before the CJEU, a national court must take account of an adopted or envisaged decision. *Paulis* finds this logical because the Commission has the special responsibility of implementing and orientating Union competition policy.[263]

The binding effect of administrative decisions should not depend on fact-sensitive rules to be applied in the context of each individual case, meaning that it should be laid down clearly under which circumstances which part of a decision is binding on whom in subsequent proceedings.[264] Since fundamental rights of defence are affected, there should be a clear legal test, ascertainable a priori.[265] What can be summarised is, that the Court neither clearly expressed a positive binding effect of Commission decisions nor did the Court carry out any analysis of the categories of issues in respect of which the administrative decision is binding.

As to the relationship between the Commission and national proceedings, it seems that there are arguments in favour for a supremacy of Commission over national court proceedings. It is true that national courts are also Union courts. Nevertheless, they cannot review or declare inapplicable Union law and they do not have the role of the Commission. Their decisions remain national in scope, whereas the Commission's decisions, whether negative or positive, have a Union wide effect resulting from Article 288 of the Treaty.[266] By disregarding a Union act (irrespective of whether or not it is based on a directly applicable provision), a national court would implicitly hold such an act invalid, contrary to the principle according to which Union acts may not be declared invalid by national courts.[267] *Paulis* argues that whereas there is no valid legal or political reason why national courts should not submit to Union acts that have acquired validity inside the Union legal order, there is, however, a compelling reason why national judges should respect definitive Union acts: if each national court could go its own way, the effect of adopted Commission decisions would vary from Member State to Member State.[268] It has also been suggested, that it might not even be desirable to have a homogeneous application of European competition law. Such an approach may be justified in certain limited cases, to the extent that the existence of different rules in different national markets with different specificities can serve either in the short term as a benchmarking device, or can be justified in the long term by different local conditions.[269] If such

---

[262] *Ibid*, pp. 111-112.
[263] E. Paulis, "Coherent Application of EC Competition Rules…", *supra* n 42, p. 420.
[264] R. Nazzini, "Parallel and Sequential Proceedings…", *supra* n 34, p. 270.
[265] *Ibid*.
[266] E. Paulis, "Coherent Application of EC Competition Rules…", *supra* n 42, p. 420.
[267] M. Siragusa, "The Modernisation of EC Competition Law: Risks of Inconsistency and Forum Shopping" in C.-D. Ehlermann, I. Atansiu (eds), *European Competition Annual 2000…*, *supra* n 42, p. 450. *See* Case 314/85 *Foto-Frost* v *Hauptzollamt Lübeck-Ost* [1987] ECR 4199, para, 15, 17.
[268] E. Paulis, "Coherent Application of EC Competition Rules…", *supra* n 42, p. 421.
[269] J. S. Venit, "The Decentralised Application of Article 81: Italian Banks, Cohabitation, Private Enforcement and other Issues Raised by the White Paper" in C.-D. Ehlermann; I. Atansiu (eds), *European Competition Annual 2000…*, *supra* n 42 p. 472.

inconsistencies are to some extent the inevitable price for decentralised antitrust law enforcement and the division of powers,[270] it seems yet not out of proportion. From a legal point of view, there is no foundation that suggests that a decision from the Commission is better than a decision from a national court.[271] It is also true, as *Jenny* points out, that in the decentralised application of antitrust rules, consistency of reasoning is more important than consistency of decision.[272] Even if one does not want to go as far as finding benefits in deviating national handlings with a Commission decision, a supremacy of Commission procedures over national procedures seems to be a step too far and incompatible with fundamental principles. It is not only out of line with the aim of decentralising the enforcement, but also poses a threat to the principle of separation of powers and the judicial independence, which shall be analysed in the following chapter.

Komninos tries to find a differentiated approach by emphasising that Article 16 of Regulation 1/2003 does not introduce a principle of primacy. Finding that the position held in *Masterfoods* and Article 16 of Regulation 1/2003 make national courts not subject to Commission authority, but rather to that of the Court of Justice, which is the only judicial organ that can review Union acts in an authentic way through Article 267 TFEU.[273]. *Wils* does not argue directly with *Komninos* but indicates the different objectives of public and private enforcement.[274] According to him, public antitrust enforcement aims at clarification and development of the law and at deterrence and punishment, while private actions for damages aim at compensation.[275]

The case law and discussions above are all in the area of antitrust law. What is about the field of state aid? Advocate General *Geelhoed* has suggested that the case law of the Court on the subject of contradicting decision can be applied by analogy also to Union state aid provisions.[276] It follows that a national court of a Member State may not deliver a judgment, which is contrary to a Commission decision addressed to that same Member State. He also states that there is an essential difference between decisions taken under Articles 101 and 102 TFEU and those taken under Article 107 TFEU: the parties to whom those decisions are addressed. The judgment of a national court in a horizontal private-law legal relationship, even if declared final, cannot affect the Commission's power to take decisions, and the same is true of the vertical relationship between a Member State and an individual in respect of the granting of aid. Judgments delivered in that connection by a national court cannot affect the Commission's exclusive powers either.[277]

---

[270] T. Wißmann, "Decentralised Enforcement of EC Competition Law and the New Policy on Cartels", 23(2) (2003) WC, p. 147.
[271] *Ibid*, p. 147.
[272] F. Jenny, "On the Modernisation of EC Antitrust Policy" in C.-D. Ehlermann; I. Atansiu, *European Competition Annual 2000…*, *supra* n 42, p. 365.
[273] A. P. Komninos, "Effect of Commission Decisions…", *supra* n 197, p. 1393.
[274] K. Middleton, *supra* n 24, pp. 115-116.
[275] W. P. J. Wils, "The Relationship between Public Antitrust Enforcement and Private Actions for Damages", 32(1) (2009) WC, p. 12.
[276] Opinion of Mr Advocate General Geelhoed delivered on 14 September 2006 in Case C-119/05 *Ministero dell'Industria, del Commercio e dell'Artigianato* v *Lucchini SpA* [2007] ECR I-6199, para. 79.
[277] *Ibid*, para. 80.

6 Separation of Powers and Judicial Independence

As seen from the previous chapters, there is a strong argument for supremacy of Union over national competition law and for supremacy of Commission proceedings over national proceedings. Commission decisions and opinions seem to have a strong influence on national court proceedings. This causes problems in relation to the judicial independence and the separation of powers, which call for closer scrutiny. First, the concept of separation of power will be described. Then, it will be explained where the principal of judicial independence has its legal basis and if it can be applied to the cooperation between national courts and the Commission. Subsequently, it will be analysed if those principles are justified objections, cutting the power of the Commission when exercising its enforcement power in European competition law.

6.1 Separation of Powers

Montesquieu divided the State into branches and created a distinction between the executive, judicative and legislative power in a State (*L'Esprit des Lois (1748)*). This became later known as the principle of separation of powers. Today the doctrine of the separation of powers is often used synonymously with constitutionalism and is a central principle of liberal-democratic states.[278] In the European Union, there is no traditional division of legislative and executive powers but these duties are rather shared between different institutions.[279] According to the Court, those rules, guaranteed through specific rules and provisions, have to ensure an institutional balance, which requires that each institution must exercise its powers with due regard for the powers of the other institutions.[280] The modern government administration or new governance and such modern constitutional law open a new scope for the application of separation of powers.[281] The principle of separation of powers is a basis for following rights and has a broad scope. The hierarchy of norms and its provisions in the Lisbon Treaty was said to be a consequence of the separation of powers.[282] In relation to appropriate division of labour and responsibility, the principle of separation of power aims to reserve for each branch a clear allocation of tasks, competences and powers that this institution can fulfil

[278] For the definition, *see*: K. Murkens; E. Jo "Constitutionalism" in M. Bevir *Encyclopaedia of Political Theory* (2010), para. 289-96.
[279] P. Craig; G. de Búrca, *supra* n 9, p. 31.
[280] Case 138/79 *SA Roquette Frères* v *Council* [1980] ECR 3333, para. 33; Case C-70/88 *Parliament* v *Council* [1990] ECR I-2041, paras. 21-22; Case C-133/06 *Parliament* v *Council* [2008] ECR I-3189, para. 58.
[281] G. Convey, "Recovering a Separation of Powers in the European Union", 17(3) (2011) ELJ, pp. 305-306.
[282] CONV 424/02, Final Report of Working Group IX on Simplification, Brussels, 29 Nov 2002.

best, which is supplemented by the principle of subsidiarity.[283] Another aspect of the separation of powers is that it provides the foundation for continuous cooperation between the Union and the Member States in which the separate powers combine in the constancy of law into a mutually complementary and completing unit of action.[284] In its original idea, separation of powers meant to ensure liberty and protection of people which is the basis for fundamental rights and ultimately also the basis for judicial independence.

6.2 Legal Basis for Judicial Independence

There are no provisions in the Treaty explicitly stating the judicial independence, but Articles 252 (1) TFEU first sentence and 19 (2) TEU require from the Union judge and Advocate General that their 'independence is beyond doubt'. The Court has also emphasised the need for judicial independence.[285] The independence of European judges is therefore a general principle.[286] The requirement of judicial independence needs to be respected as well when national judges apply Union rules.[287]
From it's ruling in *Masterfoods* it seems though, that the judicial independence of national courts is of less significance for the Court.[288] In relation to what is a court or tribunal in the meaning of Article 267 TFEU, the Court has developed a very relaxed approach.[289] This reached its apex in a Spanish case,[290] where the Court found that it was a tribunal, the members of which were drawn from the ranks of administrative officials, just because they did not receive instructions from the tax authority.[291] Most recently, the matter of judicial independence was raised in the competition case *Syfait* where the question was raised in if the Greek Competition Commission is independent to be considered as court or tribunal within the meaning of Article 267 TFEU.[292] Advocate General *Jacobs* followed a broad interpretation, close to the one of the Court in *Gabalfrisa*.[293] The Court however, came to a different conclusion, finding that it was not a court or tribunal within the meaning of Article 267 TFEU. It found that the members of the Greek Competition Commission were not sufficiently independent as it lacked particular safeguards in respect of their dismissal or the termination

[283] P. Kirchhof, "The European Union of States" in A. von Bogdandy; J. Bast (eds), *supra* n 107, p. 759.
[284] *Ibid*, p. 761.
[285] Opinion 1/91 of the Court of 14.12.1991 delivered pursuant to the second subparagraph of Article 228 (1) of the Treaty (EEA Report) [1991] ECR I-6079, paras. 47-53.
[286] p. 565.
[287] *Ibid*, p. 565.
[288] *Ibid*, p. 565.
[289] See discussions in T. Tridimas, "Knocking on Heaven's Door…", 40(1) (2003) CMLRev., pp. 27-34.
[290] Joined Cases C-110/98 to C-147/98 *Gabalfrisa and Others* [2000] ECR I-1577.
[291] T. Tridimas, "Knocking on Heaven's Door…", *supra* n 289, p. 30.
[292] Case C-53/03 *Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others* v *GlaxoSmithKline plc and GlaxoSmithKline AEVE* [2005] ECR I-4609.
[293] Opinion of Mr Advocate General Jacobs delivered on 28 October 2004 in Case C-53/03 *Syfait*, *supra* n 292; For Case *Gabalfrisa see* fn 290 *supra*, paras. 28-32.

of their appointment as well as effective safeguards against undue intervention or pressure from the executive on the members.[294]
Tridimas finds, that in more recent cases, the Court has tightened its approach again towards judicial independence.[295] In line with this move is also the opinion of AG *Colomer* in the case *De Coster*, criticising the lax approach as too flexible, inconsistent and contradictory, and proposing a new approach inspired by Article 6 ECHR, which entails a concrete requirement for judicial independence.[296] According to Article 6 (1) ECHR is everyone entitled, with regard to his civil rights and obligations, to be heard 'by an *independent* and impartial tribunal'.[297] Since national courts in applying Regulation 1/2003 deal with civil matters, Article 6 ECHR is applicable.[298] Member States, when implementing or enforcing EU measures, are not only bound by general principles of EU law but must respect the rights set out in the ECHR, even when the EU measures themselves embody the particular right claimed.[299] The CJEU deduced from Article 6 ECHR the right of every person to a fair hearing by an independent tribunal, meaning, *inter alia*, that both national and Union courts must be free to apply their own rules of procedure concerning the powers of the judge, the conduct of the proceedings in general and the confidentiality of the documents on the file in particular.[300] The Court continued that the general principle of Union law under which every person has a right to a fair trial, inspired by Article 6 of the ECHR,[301] comprises the right to a tribunal that is independent of the executive power in particular.[302]
Since the Lisbon Treaty, it is also clear from Article 6 (2) TEU that the Union shall accede to the ECHR. In Article 6 (3) TEU it also states that fundamental rights, as guaranteed by the ECHR and Fundamental Freedoms, as they result from the constitutional traditions common to the Member States, shall constitute general principles of Union law.
Another basis for the judicial independence is the Charter of Fundamental Rights of the European Union (CFR), which has since the Lisbon Treaty the same legal value as the Treaties.[303] According to its Article 47 (2) first sentence, everyone has the right for their case to be dealt with 'by an independent and impartial tribunal'. Regulation 1/2003 even explicitly states that it should be interpreted and applied with respect to the fundamental rights and the principles recognised in particular by the Charter of

[294] Case C-53/03 *Syfait*, *supra* n 292, para. 31.
[295] *Ibid*, pp. 30-34 with reference to cases like Case C-516/99 *Schmid* , *supra* n 60; Case C-17/00 *De Coster* [2001] ECR I-9445.
[296] Opinion of AG Colomer in Case C-17/00 *De Coster, supra* n 292, para. 80 *et seq*.
[297] Emphasis added.
[298] W. Durner, "Die Unabhängigkeit...", *supra* n 199, p. 567.
[299] *See*, e. g, Case C-260/89 *ERT* [1991] ECR I-2925, paras. 41, 44; Case C-219/91 *Criminal proceedings against Ter Voort* [1992] ECR I-5485, paras. 33-38; Joined Cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk* [2003] ECR I-4989, para. 69.
[300] Joined Cases C-174/98 P and C-189/98 P *van der Wal*, *supra* n 99, para. 14.
[301] *See*, e. g., Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paras. 20-21.
[302] Joined Cases C-174/98 P and C-189/98 P *van der Wal*, *supa* n 99, para. 17; on that point, *see* in particular the judgment of the European Court of Human Rights of 18 June 1971 in the case of *De Wilde, Ooms and Versyp* v *Belgium*, Series A, No 12, para. 78.
[303] Article 6 (1) TEU.

Fundamental Rights.[304]
As seen, there is a basis in the Treaties, the European Charter of Fundamental Rights and the ECHR for judicial independence.

6.3 Does the Commission's Power Intervene with those Principles?

So what are the effects of the separation of powers and judicial independence on the cooperation between the Commission and the Member States? The clash between the Commission's power and the judicial independence and separation of powers has been discussed especially in connection with the Commission's proposals in the White book. After the Commission's White Paper, a majority of Member States had reservations about the proposal to grant the Commission a right to intervene as *amicus curiae* generally on grounds that it may be difficult to reconcile this intervention with the independence of national courts.[305] But also the CJEU's case law like *Masterfoods* raised concerns and it has been commented that the 'restriction of the judicial independence of national courts seems appropriate and justified by the precedence of Union wide consistency of national court and Commission decisions'.[306]
When it comes to the application of the division of powers and judicial independence on the tasks shared between the Commission and national courts, the opinions in the legal doctrine are divided. On the one side are authors that argue that those principles cannot be applied. Commission representatives like *Paulis* or *Kjølbye* who claim that the division of powers is not relevant at all since this principle applies within the same legal order and cannot be applied, as such, to the relationship between the Union legal order and the national legal orders.[307] Authors like *Paulis* bring forward that applying the principle to that relationship would even jeopardise the rule of primacy, which is based on the application of Union law,[308] because a national judge could disregard envisaged or adopted Commission decisions that were 'only' administrative decisions. *Paulis* further maintains that this would deny the Commission of its very special role, detract from the fundamental requirement of uniform application of Union law and of legal certainty and also violate Article 4 (3) TEU, requiring Member States to facilitate the achievement of the Union's tasks and to abstain from any measure that could jeopardise the attainment of the objectives of the Treaty.[309] He argues that the Commission as an executive body is controlled by the CJEU. National courts do not have the power to declare Commission decisions invalid, which however does not oppress them since they can

[304] Regulation 1/2003, Recital 37.
[305] DG Comp Document, "White Paper on Reform of Regulation 17 – Summary of the Observations from 29.02.2000", p. 15.
[306] W. Bartels, "Kooperation zwischen EU-Kommission und nationalen Gerichten im Europäischen Wettbewerbsverfahren", 3 (2002) ZfRV, p. 87 (my translation).
[307] E. Paulis, "Coherent Application of EC Competition Rules…", *supra* n 42, pp. 420-421; L. Kjølbye, "Case C-344/98 Masterfoods", *supra* n 211, p. 179 *et seq*.
[308] *Ibid*.
[309] *Ibid*.

always reach to the Court.[310] *Siragusa*, does not find a conflict with the separation of powers and binding effect of Commission decisions either, since such an effect already constitutes an established principle of Union law.[311] One of the main reasons though seems to be, that the binding effect is necessary to safeguard coherent application of Union law.[312] The binding effect of Commission decisions would mean that the Commission could bring actions against Member States for non-compliance with the Treaty under Article 258 TFEU, whose jurisdictions would systematically violate Treaty provisions or other Union measures adopted pursuant to Treaty provisions.[313] This seems initially especially striking since the Member States cannot instruct their independent judiciary and should therefore be liable for a conduct which they have no influence on.[314] *Bartels* however finds that the initiation of an action for non-compliance against Member States whose jurisdictions do not comply with the standards set by the Commission, cannot be used as an argument against the primacy of Commission decisions and Union wide consistent application of EU competition rules. He finds that it is already recognised that Member States, whose last instance courts fail to comply with their duty under Article 267 TFEU, can be subject to an action for non-compliance.[315] The situation of those two constellations is comparable since the state has no influence on 'its' independent jurisdiction but is still held responsible for the misconduct.[316]

On the other side, there are authors that have identified a restriction of the principle of separation of power and judicial independence. They argue that Commission decisions cannot be binding for national courts because of the separation of powers. *Wils* agrees that an absolute binding force of Commission decisions would be incompatible with the fundamental principles of judicial independence and access to courts.[317] Where the critics have argued, that the separation of powers is not relevant as it only applies in the same legal order, *Marenco* takes a more differentiated approach. He distinguishes the situation where national courts interpret Union law with no requirement to give precedence to Union law, from the situation where they apply national law where they must give precedence to Union law.[318] Criticism has also addressed the issue that involvement of national courts into a system of compulsory cooperation with bodies outside the judiciary is

---

[310] *Ibid*.
[311] M. Siragusa, "The Modernisation of EC Competition Law…", *supra* n 267, pp. 450-451.
[312] W. Durner, "Die Unabhängigkeit…", *supra* n 199, p. 363; L. Kjølbye, "Case C-344/98 Masterfoods", *supra* n 211, p. 178.
[313] E. Paulis, "Coherent Application of EC Competition Rules…", *supra* n 42, p. 412.
[314] W. Bartels, "Kooperation zwischen EU-Kommissionn…", *supra* n 306, p. 87.
[315] *Ibid*.
[316] *Ibid*.
[317] W. Wils, "The Modernisation of the Enforcement of Articles 81 and 82 EC: A Legal and Economic Analysis of the Commission's Proposal for a New Council Regulation Replacing Regulation No. 17" in B. E. Hawk (ed), *Annual Proceedings of the Fordham Corporate Law Institute* 2000, pp. 357-358.
[318] G. Marenco, "The Uneasy Enforcement of Article 85 EEC as Between Community and National Levels" in B. E. Hawk (ed.), *Annual Proceedings of the Fordham Corporate Law Institute* 1993, p. 616 *et seq*.

not consistent with their independence.[319] Introducing a rule of primacy would also undermine the role of national courts as equal enforcers.[320] However, accoutringing to the Court, the principle of institutional balance is a substitute to the division of powers.[321]
It seems that the peak of the discussion was reached when the Commission issued its White paper, however since then and especially after the *Masterfoods* judgement, the criticism has declined. It seems that authors in the legal doctrine mostly accepted the situation.

[319] T. Wißmann, "Decentralised Enforcement…", *supra* n 270, p. 145.
[320] A. P. Komninos, "Effect of Commission Decisions…", *supra* n 197, p. 1423.
[321] J.-P. Jaqué, "The Principle of Institutional Balance", 41(2) (2004) CMLRev., p. 384.

7 Further Repercussions of Commission Interventions

The parallel competence of the Commission and the national courts and the far-reaching rights of the former have also effects on the parties involved before the national courts. This shall be analysed in the first part of this chapter. The second part of this chapter deals with the question how conflicts of parallel proceedings are resolved.

7.1 Effects on Parties

The interference of the Commission in national court procedures through the submission of an opinion or as *amicus curiae* may affect also the relevant parties involved in the case before it. Furthermore, the (binding) nature of Commission decisions may affect the parties.

As stated in the Antitrust and State Aid Cooperation Notice, the Commission will not hear the parties before submitting its opinion to the national courts. Such a lack of any procedure to allow input from the parties raises the issue of whether the parties' rights of defence are not unduly restricted.[322] It is though the interest of the Commission in order to safeguard the independence of the national courts that it will inform them in case the Commission has been contacted by any of the parties on issues which are raised before the national court, independent of whether these contacts took place before or after the national court's request for cooperation.[323]

At two stages in the national court proceedings it may be relevant for the parties to challenge actions involved with the Commission opinion: First, when the national court makes the decision whether or not to request a Commission's opinion and second, when the national court has received the Commission's opinion.[324] In absence of rules on procedure, the national courts have to apply their procedural rules accordingly.[325]

At the first stage, when the national court drafts a request to the Commission, the parties may not have the possibility to challenge the facts or the circumstances submitted to the Commission.[326] This results in situations where in some Members States parties have no procedural means to oblige the national judge to request an opinion form the Commission[327] and in other Member States gives parties the possibility to adopt a position on requesting an opinion[328].

---

[322] I. van Bael; J.-F. Bellis, *supra* n 184, p. 1249.
[323] Antitrust Cooperation Notice, *supra* n 45, para. 19.
[324] K. Wright, "The European Commission's…", *supra* n 84, p. 750.
[325] Antitrust Cooperation Notice, *supra* n 45, para. 35.
[326] K. Wright, "The European Commission's…", supra n 84, p. 751.
[327] As in the case Brasseries Kronenburg, *see* European Commission, Supplement to the Report on Competition Policy 2005, pp. 152-153.
[328] As it was the case in a Belgian case on beer supply, *see* DG Comp, Overview of the

As to the second stage, the national court may rely on the opinion without submitting it to the parties, consider it in chamber rather than open court or without allowing for cross-examination, which would unduly restrict the parties' rights.[329] It is also unclear what evidentiary value the opinion might have. It may be likely that the opinion becomes a sort of informal judgement outside the scope of the normal procedural safeguards raising questions as to the status of the evidence given by the Commission.[330] As opinions are excluded from actions for annulment under Article 263 TFEU, the only way to challenge them indirectly is if the national judge refers the matter to the CJEU for a preliminary ruling.[331]
Similar concerns regarding the rights of defence of the parties as to opinions exist in relation *amicus curiae* submission. Even though an *amicus curiae* submission is not binding on the national judge, it is likely to carry great weight. As an *amicus curiae* submission delivered by the Commission could in practice determine the outcome of the case, it is thus important to ensure that the rights of defence of the parties are not bypassed.[332] The Court has held in *Van der Wal* that when the Commission 'acts as a legal or economic adviser to the national court and documents drafted in the exercise of that function must be subject to national procedural rules *in the same way as any other expert report*, in particular as regards disclosure'.[333]
As to the (binding) effect of Commission decisions on parties, this may especially concern third parties, who are not the addressees of the Commission decision but may still be affected. If the time limit for challenging the Commission decision under an action for annulment has expired, the only way for them is to convince the national judge to refer the question to the CJEU for a preliminary ruling. It has been held that persons who have standing under Article 263 TFEU but did not take part in proceedings before the Commission are not bound by the Court's criteria set out in *TWD Textilwerke*.[334] The biggest legal uncertainty of Commission decisions on the parties involved in a national court proceeding may however result from the possibility of the Commission to issue a contradictory decision after the national court has given a judgement and even after that judgement has gained the status of *res judicata*.

7.2 Conflicting Procedures

As the Commission can enforce Union antitrust rules and courts in all Member States, there is potential for conflict between proceedings pending with a national court and the Commission, between an action for annulment with the General Court and a preliminary reference procedure with the CJEU and, finally, potential for conflict between contradicting judgements

---

Application of the EC Competition Rules by National Courts in 2006, p. 2.
[329] K. Wright, "The European Commission's…", *supra* n 84, pp. 750-751.
[330] I. van Bael; J.-F. Bellis, *supra* n 184, p. 1249.
[331] K. Wright, "The European Commission's…", *supra* n 84, p. 752.
[332] p. 46.
[333] Joined Cases C-174/98P and C-189/98P *Van der Wal*, *supra* n 99, para. 25.
[334] Case C-188/92 *TWD Textilwerke Deggendorf GmbH* v *Bundesrepublik Deutschland* [1994] ECR I-833; R. Nazzini, *supra* n 221, p. 190.

in different Member States.

7.2.1 Parallel Procedures at Commission and National Courts

Since the Commission and the national courts share the enforcement of the antitrust rules, there is a risk that both procedures overlap. The Commission was already aware of this problem, however finding that it has given rise in the past to very few problems.[335] The Commission's White paper also addresses four scenarios and suggests principles for solving those conflicting proceedings.[336]

7.2.1.1 Final or Envisaged Commission Decision and Subsequent National Court Proceedings

The first scenario covers the situation where the Commission has initiated proceedings or if it has already adopted a final decision.[337] National courts have the competence to still deal with the same case,[338] as their function is different.[339] As already established in Chapter 5 *supra*, according to Article 16 (1) of Regulation 1/2003 and to *Delimitis* and *Masterfoods*, the national court must avoid giving decisions that conflict with an envisaged or already existing Commission decision. The national court may ask the Commission if it has initiated proceedings or contemplates a decision.[340] To ensure legal certainty, the national court may stay its procedure in this case.[341] The Commission promised to attempt to give priority to such cases where the Commission has decided to initiate a procedure and where there is an ongoing national court procedure awaiting its outcome.[342] A national court may, however, decide in a case pending before it without it being necessary to ask the Commission for information or await the Commission decision.[343] This is where the national court cannot reasonably doubt the Commission's contemplated decision or where the Commission has already decided on a similar case.[344]

As to the situation where the Commission has already adopted a decision, I have discussed the binding effects of Commission decisions already in Chapter 5 *supra* and found that the national court is bound by it, because it has not the power to declare Union acts invalid. A possibility to deviate from the Commission decision is if there is an action for annulment of the

[335] White paper, *supra* n 21, para. 102.
[336] *Ibid*.
[337] *Ibid*, para. 102 (1).
[338] Antitrust Cooperation Notice, *supra* n 45, para. 11 fn. 29. A parallel application of Articles 101 or 102 TFEU by the Commission and a national court is only prevented when the latter has been designated as a national competition authority (Articles 11 (6) and 35 (3) and (4) of Regulation 1/2003).
[339] A. P. Komninos, "Effect of Commission Decisions…", *supra* n 197, p. 1405.
[340] Antitrust Cooperation Notice, *supra* n 45, para. 12.
[341] *Ibid*.
[342] *Ibid*.
[343] *Ibid*.
[344] *Ibid*.

decision pending before the General Court or if the national court decides to make reference on the validity of the decision to the CJEU.[345] It also seems reasonable for a national court to deviate from a Commission decision, if the facts of the case have materially changed or if it has been overruled in its substance by a Union court's judgement.[346] A departure from a Commission decision in this case would not violate Article 16 (1) of Regulation 1/2003, as its substance will have been superseded by a subsequent Union Court judgement, which the national court here follows.[347] If there already exists a Union Court judgement that supersedes the Commission decision, the national court can depart from the latter and follow the former.[348] The national court will in this case not declare invalid a Union act but only decide not to give deference to it.[349]

As to envisaged Commission decisions, the national court may have to stay proceedings and order interim relief. Even though national courts have to give effect to Union law and Article 16 (1) of Regulation 1/2003 aims to ensure uniform application of Union rules and legal certainty, they still have under their procedural autonomy a certain degree of discretion to order a stay.[350] The national court has to balance the likelihood of conflicting decisions versus other factors such as length of the administrative proceedings and importance for the parties involved.[351] The Court has addressed the discretion of national courts to stay proceedings in cases like *BRT v SABAM*[352] and *Delimitis*[353]. Where it is clear that the behaviour in dispute does not have any effect on Union antitrust rules or where there is clearly an infringement of the antitrust proceedings, the national court can go ahead with its proceedings.[354] The national court could further always refer to the CJEU for a preliminary ruling.

7.2.1.2 Non-final National Court Judgement and Envisaged Commission Decision

A second scenario is, that there is a national court judgement, which is still open for appeal (meaning there is not yet a *res judicata* effect) or still pending and the Commission decides in the meantime to initiate proceedings itself and plans to issue a decision.[355] The principal of avoiding

---

[345] A. Schaub, "Panel One Discussion: Compatibility, Efficiency, Legal Security" in C.-D. Ehlermann; I. Atansiu (eds), *European Competition Annual 2000…*, *supra* n 42, p. 35.
[346] See discussions in Chapter 5.3 *supra*. *See also* A. P. Komninos, "Effect of Commission Decisions…", *supra* n 197, p.1407; J. S. Venit, "Brave New World…", *supra* n 32, p. 560; E. Paulis, "Coherent Application of EC Competition Rules…", *supra* n 42,, p. 423.
[347] A. P. Komninos, "Effect of Commission Decisions…", *supra* n 197, p. 1407.
[348] A. P. Komninos, *EC Private Antitrust Enforcement* (2008), p. 126.
[349] A. P. Komninos, "Effect of Commission Decisions…", *supra* n 197, p. 1407.
[350] R. Nazzzini, *supra* n 221, p. 146; *See* also, R. Greaves, "Concurrent Jurisdiction in EEC Competition Law: When should a National Court Stay Proceedings?", 8(3) (1987) ECLRev., p. 264; C. A. Jones, *Private Enforcement of Antitrust Law in the EU, UK and USA* (1999), pp. 100-103.
[351] *Ibid*, p. 147.
[352] Case 127/73 *BRT* v *SABAM*, *supra* n 49,para. 21 *et seq*.
[353] Case C-234/89 *Delimitis*, *supra* n 44, para. 47 *et seq*.
[354] *Ibid*, para. 47; Case 127/73 *BRT* v *SABAM*, *supra* n 49, para. 21.
[355] White paper, *supra* n 21, para. 102 (4).

contradicting decisions will then have to be obeyed by the national court of appeal.[356] The Court in *Masterfoods* has emphasised the autonomous power of the Commission to adopt a decision anyway: 'the Commission cannot be bound by a decision given by a national court in application of Articles [101] and [102] of the Treaty. The Commission is therefore entitled to adopt at any time individual decisions under Articles [101] and [102] of the Treaty, *even where an agreement or practice has already been the subject of a decision by a national court and the decision contemplated by the Commission conflicts with that national court's decision*'.[357] The Commission has therefore the power to adopt decisions at all time.[358]
Another issue that comes here into play is the interrelation with the possibility for the Commission to engage in the proceedings as *amicus curiae* or though submission of an opinion. If the Commission has already engaged in proceedings before the national court of first instance can it still open proceedings and thereby 'pre-empt' the national court of appeal?[359] In law, there is no obstacle that would prevent the Commission from doing so, as long as Union interests dictate so.[360] *Cooke* argues that in this case, it would be 'highly doubtful whether it is either legally appropriate or practically wise for the Commission to contemplate the adoption of a decision' if there has been no change of the circumstances of the case.[361] It would also be less justified for the Commission to intervene even if it had not participated in the prior national proceedings but has been informed about the case.[362] A contra argument would be, that it is not certain whether the parties would actually appeal the case and a serious antitrust law issue could consequently only be addressed by a subsequent Commission decision.[363] According to *Kjølbye*, even though they both pursue a fundamental aim, namely the effective and consistent application of law, the instruments are complementary in their nature.[364] The *amicus curiae* intervention is preventive, whereas the Commission decision is corrective.[365] The Commission still has the power to issue a decision, in practice and for resource reasons the Commission might use them as alternatives though.[366] It is also practically less likely for the Commission to

[356] *Ibid*; L. O. Blanco, *supra* n 79, p. 80; Case T-65/98 *Van den Bergh Foods* v *EC Commission* [2003] ECR II-4653, para. 199.
[357] Case C-344/98 *Masterfoods*, *supra* n 205, para. 48 (emphasis added).
[358] A. P. Komninos, „Effect of Commission Decisions...", *supra* n 197, p. 1408; J. Burrichter, "The Application of Article 81 (3) by National Courts: Some Remarks from the Point of View of a Practitioner" in C.-D. Ehlermann; I. Atansiu, *European Competition Annual 2000…*, *supra* n 42, pp. 541-542; J. Gröning, "National Judges in a Modernised Community Law System: A Special View to Procedural Aspects" in C.-D. Ehlermann; I. Atansiu (eds), *European Competition Annual 2000…*, *supra* n 42, p. 585.
[359] *See* also *ibid*, p. 1409.
[360] *Ibid*, p. 1410.
[361] J. D. Cooke, "Commission White Paper on Decentralisation of Competition Rules: The Threat to Consistency" in C.-D. Ehlermann; I. Atansiu, *European Competition Annual 2000…*, *supra* n 42, pp. 558-559.
[362] *Ibid*.
[363] A. P. Komninos, „Effect of Commission Decisions...", *supra* n 197, p. 1409 fn. 96.
[364] L. Kjølbye, "Case C-344/98 Masterfoods", *supra* n 211, p. 179.
[365] *Ibid*.
[366] *Ibid*, p. 180.

adopt a decision if a national court has referred the matter to the CJEU. The Commission is still entitled to do so but would still have to compile with the ruling of the CJEU.[367]
It has also been highlighted, that the Commission should, in line with Article 4 (3) TEU, only intervene when the responsibilities under the Treaty require it, otherwise it would discourage the enforcement at national level.[368] *Kjølbye* suggests furthermore that the cases should be limited to situations where an important policy or enforcement issue is raised, similar to the one in *Van den Bergh Foods*.

7.2.1.3 Final Positive National Court Judgement and Envisaged Negative Commission Decision

The third circumstance covers situations where national courts have reached a final judgement finding EU antitrust provision not to be infringed ('positive' judgement) and the Commission intends to find them to be violated ('negative' decision). The Commission's power is subject only to the principle of *res judicata* that applies to the dispute between the parties themselves, which has been decided once and for all by the national court.[369] The situation in *Masterfoods* was similar to the one discussed here, although the Commission had initiated proceedings before, there was a final national court judgement.[370] The situation is more complex though, if there is a final national court judgement. The argument of the Commission is that the principle of *res judicata* is only applicable between the parties but does not prevent it from acting afterwards to ensure consistency in the application of Articles 101 and 102 TFEU.[371] The Commission by decision prohibit the agreement or practice at issue with *erga omnes* effect for all market players except the litigants of the case.[372] It has been received with criticism how the Commission can adopt a decision without infringing the *res judicata* effect of the national judgement. The peculiar situation could arise where an agreement would be *res judicata* between a supplier and one distributor (*inter partes*) but all other agreements of the network would be invalid according to the subsequent Commission decision.[373] The consequence of such a contradicting Commission decision would hence be that even though the national judgement still stands, its *res judicata* effect would be rendered nominal.[374] *Burrichter* argues differently, finding that the *res judicata* should not bar the opening of an administrative procedure because it is justified by the public interest and its subject is different from the civil law case. It is though not possible in a subsequent procedure to impose fines on the parties. [375]

---

[367] A. P. Komninos, "Effect of Commission Decisions...", *supra* n 197, pp. 1410-1411.
[368] L. Kjølbye, "Case C-344/98 Masterfoods", *supra* n 211, p. 178.
[369] White paper, *supra* n 21, para. 102 (2).
[370] Case C-344/98 *Masterfoods*, *supra* n 205, para. 48.
[371] L. O. Blanco (ed), *supra* n 79, p. 79 fn. 65.
[372] A. P. Komninos, "Effect of Commission Decisions...", *supra* n 197, p. 1412.
[373] *Ibid*.
[374] *Ibid*, p. 1413.
[375] J. Burrichter, "The Application of Article 81 (3) by National Courts…", *supra* n 358, pp. 541-542.

The principle of *res judicata* is however not an absolute one. The Court has found in *Kühne & Heitz* where the duty to give full effect to Union law prevailed the principle of legal certainty and *res judicata*.[376] *Komninos* also argues that legal certainty, the principle underlying *res judicta*, cannot be created by a national supreme court's judgement as far as Union law is concerned, as this is the sole competence of the CJEU.[377] The same issue of contradicting Commission decisions issued after a final national judgement arose already under the previous enforcement system. *Marenco* already noted then that 'any *res judicata* defence offered by the national legal order would offend against the precedence due to European [Union] law'.[378] Back to the CJEU's jurisprudence on *res judicata*, the Court confirmed its position in *Kempter*.[379] However, those judgements are on the reopening of administrative decisions and as the Court held in *Kapferer*, those findings cannot be transposed to the reopening of final judgements, placing more emphasis on *res judicata* and the finality of national judicial proceedings.[380]
In *Luccini*, a case dealing with the recovery of unlawful state aid, the Court held that Union law precludes a national rule on *res judicata* which prevents the recovery of state aid granted in breach of Union law which has been found to be incompatible with the common market in a final Commission decision.[381] However, the situation in state aid is different, as the Commission has the full competence to declare a measure compatible with the common market. The ruling can therefore not be applied to the situation in question. In the more recent cases, the Court has addressed *res judicata* in relation to VAT, holding that a national court cannot rely on *res judicata* as that would undermine the effectiveness of EU VAT rules.[382] Here it has to be noted though, that the VAT is an area which is fully harmonised in the Union and the ruling cannot be applied the situation at hand.
The Court's case law on *res judicata* should be read in line with *Factortame I*,[383] and it could be argued that a national court may be required under Article 4 (3) TEU to use all its possible means in order to set aside a judgement that conflicts with Union law, if this conflict is an intolerable situation for Union law.[384]
Another ambiguity is what happens if there are subsequent national court proceedings with the same litigants for example if they are called upon to enforce the former judgement or eventual new civil proceedings between the

[376] Case C-453/00 *Kühne & Heitz NV* v *Produktschap voor Pluimvee en Eieren* [2004] ECR I-837, paras. 24-28 where the Court established four conditions for reopening an administrative decision.
[377] A. P. Komninos, "Effect of Commission Decisions...", *supra* n 197, p. 1415.
[378] G. Marenco, "The Uneasy Enforcement of…", *supra* n 318, pp. 619-620.
[379] Case C-2/06 *Willy Kempter KG* v *Hauptzollamt Hamburg-Jonas* [2008] ECR I-411.
[380] Case C-234/04 *Rosmarie Kapferer* v *Schlank & Schick GmbH* [2006] ECR I-2585, para. 20.
[381] Case C-119/05 *Ministero dell'Industria, del Commercio e dell'Artigianato* v *Lucchini SpA* [2007] ECR I-6199, paras. 60-63.
[382] Case C-542/08 *Friedrich G. Barth* v *Bundesministerium für Wissenschaft und Forschung* [2010] ECR I-3189. *See* also Joined Cases C-95/07 and C-96/07 *Ecotrade SpA* [2008] ECR I-3457.
[383] Case C-213/89 *The Queen* v *Secretary of State for Transport, ex parte: Factortame Ltd and others* [1990] ECR I-2433.
[384] A. P. Komninos, "Effect of Commission Decisions...", *supra* n 197, p. 1417.

litigants.[385] It is unclear, whether the national court is then bound by Article 4 (3) TEU and Article 16 (1) of Regulation 1/2003 to rely on the Commission decision or give priority to *res judicata*. *Komninos* finds that the former might be the correct approach.[386] *Preece* is of the same opinion, who also goes a step further and finds that a contradicting Commission decision even has influence on national time bars for appeal and the possibility of *restitutio in integrum*.[387]
The possibility that the Commission issues a deviating decision after the national court has given its judgement has not been yet addressed by the CJEU, who will have the final word on the issue of the legality of this potential situation.[388]

7.2.1.4 Final Negative National Court Judgement and Envisaged Positive Commission Decision

The fourth and last hypothesis covers the situation where the final national judgement finds the EU antitrust rules to be breached ('negative' judgement) and the Commission holding in a decision that it does not violate those rules ('positive' decision). The Commission has held that it will not normally contradict in those situations otherwise than as an intervener on a reference for a preliminary ruling under Article 267 TFEU, if any such reference is made.[389] It has been suggested that a possible motivation for this approach might be the Commission's broader concerns over wrong authorisation of anti-competitive agreements than about the wrong prohibition of harmless rules.[390]
The Commission has also the power to adopt a decision in this situation and national courts the duty to avoid contradicting the Commission decision according to *Delimitis* and *Masterfoods* and Article 16 (1) of Regulation 1/2003 is all the same true for this circumstance.
What however distinguishes the situation here from the one in the previous chapter, is that it will not affect the national *res judicata* in practical terms since the Commission decision is not accompanied by an injunction.[391] This is as the Commission decision will be only of declaratory nature and in the Union public interest (under Article 10 of Regulation 1/2003) without affecting the national court's judgement.[392]
The losing party of the national court proceedings might however have an interest in reopening the national court's judgement. In case national procedural law provides for such a possibility, the court will then be bound by Article 16 (1) of Regulation 1/2003 and may not contradict the Commission decision. Union law nevertheless cannot be stretched so far, in comparison to the situation described in the previous chapter, as to provide a

[385] *Ibid*, pp. 1414, 1418.
[386] *Ibid*.
[387] S. Preece, "Masterfoods v. HB Ice Cream Ltd.", *supra* n 205, p. 285.
[388] *See also* 27(3) (2004) WC, p. 326.
[389] White paper, *supra* n 21, para. 102 (3).
[390] A. Jones; B. Sufrin, *EC Competition Law, Text Cases and Materials* (2004), p. 1026.
[391] A. P. Komninos, "Effect of Commission Decisions...", *supra* n 197, p. 1421.
[392] *Ibid*; L. Kjølbye, "Case C-344/98 Masterfoods", *supra* n 211, p. 182.

legal basis for a duty to reopen a final national judgement if there is no base for this in the national procedural rules.[393]

7.2.2 Relationship Between Action for Annulment and Preliminary Reference Procedure

A national court might decide to refer an issue to the CJEU, while in parallel decision of the Commission in the same case is challenged before the General Court. It is unclear, what the relation between the preliminary reference procedure and the action for annulment is. In *Masterfoods* the Court of Justice stated that it is for the national court to decide in a case whether to suspend proceedings until a definitive decision has been given in the action for annulment, or to refer a question to the Court for a preliminary ruling.[394] The Court however continued that the national court should stay the proceedings unless it considers that, in the circumstances of the case, a reference to the Court of Justice for a preliminary ruling on the validity of the Commission decision is warranted.[395] Some authors read the judgement in the light that national courts should always have the possibility to refer to the CJEU.[396] Other authors interpret the ruling as the national court has the duty to await the action for annulment and a preliminary reference is only possible in exceptional circumstances, giving the action for annulment priority before the preliminary reference.[397] This approach seems justified, as the Court required a justification if the national court wants to refer the matter to it.

A preliminary reference from the national court is possible only within the limits of *TWD Textilwerke*,[398] which established that parties that failed to challenge a Commission act under Article 263 TFEU cannot later circumvent that provision and challenge the same decision through a preliminary reference under Article 267 TFEU. Those principles do not apply, if the addressee of the Commission decision has brought an action for annulment within the time limits of Article 263 TFEU.[399]

The issue of possible parallel procedures with the CJEU and the General Court has been addressed by AG *Cosmas* in its opinion on *Masterfoods*, formulating a guiding principle to the effect that the national court is not obliged to await the outcome of the action for annulment, even if it is essential, before it makes a reference for a preliminary ruling to the

[393] *Ibid*, p. 1422.
[394] Case C-344/98 *Masterfoods*, *supra* n 205, para. 55.
[395] *Ibid*, para. 57.
[396] S. O'Keeffe, "First Among Equals…", *supra* n 233, p. 304.
[397] W. Bartels, "Kooperation zwischen EU-Kommission...", *supra* n 306, p. 90; L. Malferrari, "Neues zur Kompetenzverteilung zwischen Kommission und nationaler Gerichtsbarkeit auf dem Gebiet des Wettbewerbs und zum Verhältnis zwischen der Nichtigkeitsklage und dem Vorabentscheidungsverfahren Anmerkungen zum Urteil des EuGH in der Rechtssache Masterfoods", 4 (2001) EuR, p. 611.
[398] Case C-188/92 *TWD Textilwerke*, *supra* n 334.
[399] Case C-344/98 *Masterfoods*, *supra* n 205, paras. 55, 60.

CJEU.[400] In spite of this, he continues to find that certain circumstances, like in the case at hand, may require deviating from that general principle.[401] As reasons against the admissibility of a preliminary reference, he puts forward that parallel procedures would increase the risk of conflicting decisions being handed down or at least the risk of distorting the procedural rules and the abuse of legal remedies.[402] Additionally, *Cosmas* finds the procedure before the General court more effective as they can review issues of substance such as the finding and assessment of facts, whereas the review by the CJEU is limited to the interpretation and assessment of the legality of legislative and individual acts of the Union institutions.[403]
His arguments are only partly convincing, as there is doubt whether there is an actual risk of conflicting Union court decisions.[404] Article 54 (3) of the Statute of the CJEU[405] regulates that in case of parallel procedures before the Court of Justice and the General Court, both courts have the possibility to stay their proceeding. The statute finds a parallel procedure where the courts are seized of cases in which the same relief is sought, the same issue of interpretation is raised or the validity of the same act is called in question. The Statute also indicates that 'where the action is one brought pursuant to Article 263 TFEU, the General Court may decline jurisdiction to allow the Court of Justice to rule on such actions.'[406] In the same circumstances, the Court of Justice may also decide to stay the proceedings before it; in that event, the proceedings before the General Court shall continue. The recommendation for the General Court to decline jurisdiction in case of an action brought according to Article 263 TFEU, may however not refer to the situation where a Commission decision is challenged but rather to the possibility of the General Court to deal with a case based on its power to give preliminary rulings. However, since the Statute provides for possibilities to solve parallel procedures, conflicting Union court decisions seem practically very unlikely.
What can be summarised, is that the national court generally has the possibility to refer a matter that is already pending with an action for annulment also to the CJEU, if it regards it as necessary. Otherwise it is may stay proceedings and await the outcome of the annulment action.

7.2.3 National Court Procedures in Several Member States

A final issue is the risk of conflicting procedures between different national courts. Even though it is not a matter affecting the relationship between the Commission and the national courts in the enforcement of the Union

[400] Opinion of Mr Advocate General Cosmas in Case C-344/98 *Masterfoods*, *supra* n 205, para. 39.
[401] *Ibid*, para. 40.
[402] *Ibid*, para. 46.
[403] *Ibid*, para. 52.
[404] *See also*, W. Bartels, "Kooperation zwischen EU-Kommission...", *supra* n 306, p. 91.
[405] Protocol (No 3) on the Statute of the Court of Justice of the European Union from 30.3.2010, OJ C 83/210 (hereinafter 'Statute of the CJEU').
[406] Article 54 (3) of the Statute of the CJEU.

competition rules, it is of great importance and shall be analysed briefly. Neither Regulation 1/2003 nor Regulation 456/1999 contain provisions for such a situation. Therefore, horizontal cooperation between national courts in applying Union law will follow the general rules established by the Brussels I Regulation[407], regulating judicial cooperation in the field of civil matters as regards assistance, and recognition and enforcement of court decisions.[408] The rules on *lis pendens* and related actions laid down by Articles 21 and 22 of the Brussels I Regulation should avoid the risk of conflicting decisions by different national courts applying Articles 101 or 102 TFEU to the same agreement or practice.[409] However, it has been argued that Article 21 of the Brussels I Regulation is too narrowly defined to prevent conflicting decisions.[410] That provision applies solely to the extent that the same cause of action and the same parties are involved in proceedings brought before the courts of different contracting states.[411] For example, a case that involves a manufacturer and distributors situated in different Member States would not be covered by Article 21 of the Brussels I Regulation, despite the fact that the contractual arrangements between the parties would be identical and hence a judgment issued in one of these disputes cannot be recognised in another dispute pursuant to Article 27 of the Brussels I Regulation.[412] This may not only lead to inconsistencies and conflicting judgements but also allows for forum shopping.[413]
It is therefore true, that in future it might become necessary to further promote horizontal cooperation between courts of different Member States.[414]

[407] Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.
[408] E. Paulis, "Coherent Application of EC Competition Rules…", *supra* n 42, pp. 406-407.
[409] M. Siragusa, "The Modernisation of EC Competition Law", *supra* n 267, p. 452.
[410] J. H. J. Bourgeois; C. Humpe, "The Commission's 'New Regulation 17'", *supra* n 147, p. 46.
[411] *Ibid*, p. 47.
[412] *Ibid*, p. 46.
[413] K. Lenaerts ; D. Gerard, "Decentralisation of EC Competition Law Enforcement…", *supra* n 28, pp. 326-328.
[414] *Ibid*, pp. 406-407.

8 Conclusion and Outlook

Faced with an inefficient system, the Commission reviewed its competition policy at the begin of the century and as a result, antitrust policy and enforcement in the EU had undergone major changes. The new enforcement system aims at strengthening the involvement of national courts and follows the new governance policies of subsidiarity and decentralisation. Whereas subsidiarity might only be applicable as general spirit, decentralisation became the guiding theme accompanying the changes. Compared to the changes in antitrust law, state aid law has experienced only small changes in its enforcement. It might be now at a stage, where antitrust law was before its modernisation. Hence, a major part of the enforcement of state aid still rests with the Commission, who has the sole competence to declare state aid compatible with the common market. The Commission's State Aid Cooperation Notice mirrors many of the rules laid down for the cooperation between the Commission and the national courts in the Antitrust Cooperation Notice. Union State aid law is however lacking a legal basis for such a relationship, like Regulation 1/2003 for antitrust law.

In the absence of Union rules laying down the enforcement of Union competition rules, Member States apply their own procedural rules. The relationship between the Commission and the national court is based on general EU law principles like the supremacy of Union law and the duty of loyal cooperation in Article 4 (3) TEU. To further promote consistent application of EU competition rules, the Commission, as primary enforcer, has introduced a number of (partly new) instruments in the cooperation with the national courts. As discussed in chapter 3, major issues occur in relation to the Commission's opinion and the intervention as *amicus curiae*. Uncertainty is created due to the lack of procedural guidelines laid down for these instruments and information provided with regard to their effect and scope. The problems regarding the *amicus curiae* intervention are however limited to the area of antitrust law. The Commission has reserved itself a powerful tool with *amicus curiae* interventions, where it could theoretically intervene in any national court proceedings where the uniform application of Union competition rules is at stake. Practically, since the introduction of this tool, the Commission has only intervened in a small number of cases. It seemed though, that in the cases where the Commission intervened, the national court was willing to follow it. This however is only a preliminary impression and in need of further research. The introduction of new instruments as through *amicus curiae* submissions has been questioned, with regard to the fact that forty years of application have shown that conflicts are far less frequent in practice than textbooks would suggest.[415] The principles of cooperation and primacy may already be sufficient to resolve possible conflicts.[416]

Commission decisions, even not a tool regulating the relationship between the Commission and national courts *per se*, have great influence on national

[415] E. Paulis, "Coherent Application of EC Competition Rules…", *supra* n 42, p. 403.
[416] E. Paulis, "Coherent Application of EC Competition Rules…", *supra* n 42, p. 403.

court proceedings and are fraught with uncertainties. The binding effect of Commission decisions has been widely discussed in legal doctrine but the situation is far from clear. Even the Court's ruling in *Masterfoods* did only shed little light on the situation. There seems to be a consensus that those decisions cannot positively bind the national court but only oblige it not to contradict Commission decisions. If looking at the scope of what is binding about a Commission decision, it is unclear if the substantive part is effective as well. The English courts found to be bound by a Commission decision only if the parties and the facts of the case were the same. This approach might not be the preferred with regard to consistent application of EU competition law, but it seems the better one when it comes to legal certainty. Depending on what the binding effect of Commission decisions will be, this will also decide on the effect it will have on the judicial independence. If Commission decisions are only binding where the parties of case and the facts are the same with the one at the national court, the effect on the judicial independence will be no more than necessary. If, however, the binding effect of Commission decisions will be interpreted broadly, this would seem to intervene more than what can be considered necessary to ensure uniform application. This is not only because there is a right for judicial independence based on the Treaties, the CFR and the ECHR, but it is also questionable why Commission decisions should be considered better than national court judgements. There is also a valid argument that it might not be even desirable to have uniform application of competition rules at the national level is in all cases.[417] Even though criticism in the doctrine has abated about the judicial independence, as long as there is uncertainty about the scope of Commission decisions, there is a risk for judicial independence.
When it comes to the parties involved in the national court proceedings, they are affected by the lack of procedural rules on the opinion and *amicus curiae* interventions. The parties may not have the possibility to 'force' their national court to request an opinion. There may be also procedural lacks when the court bases its judgement on a Commission opinion or *amicus curiae* submission without submitting it to the parties. They may further have no influence on the information or facts that the court submits to the Commission, which will be the basis for its opinion, nor may they have possibilities to challenge the opinion or submissions in their national court.
Most legal uncertainty may be created through the risk of parallel procedures and the possibility for the Commission to open investigations and issue a decision at any time. The Court has clearly confirmed the power of the Commission to issue decisions at any time. This power stretches even to cases where there is a final national court judgement. The Commission can issue a contradicting decision with the result that, subject to the possibilities under national procedural rules, the previous national court judgement will not be enforceable anymore as national courts have to give primacy to Commission decisions. This bears an intolerable amount of legal uncertainty for the parties.
When looking at the conflicts of parallel procedures, the magnitude of the Commission's powers is brought to another level and ultimately questions

[417] J. S. Venit, "The Decentralised Application of Article 81…", *supra* n 269, p. 458.

the quality of decentralisation in antitrust law. It is questionable whether one can still speak of a decentralised system, where national courts have the power to enforce Union competition rules. Are national courts still free to decide? If they are dealing with a case touching upon EU competition law and they decide not to take into account a Commission submission of any kind, there is always the risk that the Commission issues a decision itself, which undermines the court's judgement. The Commission has not the right to take away proceedings from a national court, but its far-reaching rights come close to such a right.

It seems that the Commission's exclusive competence for the application of the competition rules is contrary to the principle of subsidiarity because it sometimes prevents files from being handled at the most effective level. It has been commented that competition policy as such is not going to be decentralised, only its enforcement will be;[418] but even that seems doubtful. If the Commission believes in subsidiarity and decentralised administration of competition rules, it should accept the logic of its proposal and live with the results, even if that may mean having to live with some decisions it would rather not have.[419] The Commission cannot on the one hand opt for a decentralised system of such a kind, while on the other hand, seek to reserve itself both the right to intervene at national level to promote its view and still exercise the prerogative of overturning results of which it disapproves.[420]

It has been suggested that the enforcement powers of the Commission are similar to having its own preliminary reference procedure.[421] It seems questionable though if the Commission as administrative authority and not being an independent court can provide that.

A next step in the coherent application of EU competition rules that the Commission has taken into focus is giving binding effect to decisions of national competition authorities. The Commission issued a White Paper on damages actions in 2008 which foresees a number of procedural changes of which the one with the most impact is probably to introduce a binding effect of Member State competition authority decisions on national courts throughout the Union.[422]

The other question is, if there will be a decentralised enforcement of EU state aid rules. The general need for reform in the area of state aid has already been expressed.[423]

---

[418] Ehlermann, p.380.

[419] J. D. Cooke, "Centralised Subsidiarity", pp. 19-20 cited in A. P. Komninos, "Effect of Commission Decisions…", *supra* n 197, p. 1409.

[420] J. D. Cooke, "Commission White Paper on Decentralisation of Competition Rules…", *supra* n 361, p. 559.

[421] K. Wright, "The Commission's Own Preliminary…", *supra* n 84.

[422] *See* a more detailed analysis of this issue K. Wright, "Binding the Judicial with the Administrative" November (2008) ECLMD, p. xxii; C. A. Jones, "After the Green Paper: The Third Devolution in European Competition Law and Private Enforcement", 3(1) (2006) CLRev..

[423] *See*, J. Lever, "The EC State Aid Regime: The Need for Reform" in A. Biondi; P. Eeckhout; J. Flynn, *The Law of State Aid in the European Union* (2005), 303 *et seq*.

Bibliography

Articles

Andenas, Mads; Nazzini, Renato, "Awarding Damages for Breach of Competition Law in English Courts – Crehan in the Court of Appeal", *European Business Law Review*, Volume 17 Issue 4, 2006, pages 1191-1210

Andreangeli, Arianna, "Courage Ltd v Crehan and the Enforcement of Article 81 EC before the National Courts" (case comment), *European Competition Law Review*, Volume 25 Issue 12, 2004, pages 758-764

Andreangeli, Arianna, "The Enforcement of Article 81 EC Treaty before National Courts after the House of Lords' Decision in Inntrepreneur Pub Co Ltd v Crehan", *European Law Review*, Volume 32 Issue 2, 2007, pages 260-270

Armstrong, Kenneth; Kilpatrick, Claire, "Law, Governance, or New Governance? The Changing Open Method of Coordination", *Columbia Journal of European Law*, Volume 13 Issue 3, 2006-2007, pages 649-677

Bast, Jürgen; Bogdandy, Armin von "The European Union's Vertical Legal Order of Competences: The Current Law and Proposals for its Reform", *Common Market Law Review*, Volume 39 Issue 2, 2002, pages 227-268

Bartels, Wolfgang, "Kooperation zwischen EU-Kommission und nationalen Gerichten im Europäischen Wettbewerbsverfahren", *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht*, Issue 3, 2002, pages 83-94

Brammer, Silke "Concurrent Jurisdiction under Regulation 1/2003 and the Issue of Case Allocation", *Common Market Law Review*, Volume 42 Issue 5, 2005, pages 1383-1424

Borchardt, G.M.; Wellens, K.C., "Soft Law in European Community Law", *European Law Review*, Volume 14 Issue 5, 1989, pages 267-321

Bourgeois, Jacques H.J.; Humpe, Christophe, "The Commission's draft 'New Regulation 17'", *European Competition Law Review*, Volume 23 No 2, 2002, pages 43-51

Convey, Gerard, "Recovering a Separation of Powers in the European Union", *European Law Journal*, Volume 17 No 3, 2011, pages 304-322

Durner, Wolfgang, "Die Unabhängigkeit nationaler Richter im Binnenmarkt – zu den Loyalitätspflichten nationaler Gerichte gegenüber der EG-Kommission, insbesondere auf dem Gebiet des Kartellrechts", *Zeitschrift für Europarecht*, No 4, 2004, pages 547-574

Ehlermann, Claus-Dieter, "The Modernisation of EC Antitrust Policy: A Legal and Cultural Revolution", *Common Market Law Review*, Volume 37 Issue 3, 2000, pages 537-590

Gatto, Alexandra, "Governance in the European Union: A Legal Perspective", *Columbia Journal of European Law*, Volume 12 Issue 2, 2006, pages 487-516

Gilliams, Hans M. "Modernisation: From Policy to Practice", *European Law Review*, Volume 28 Issue 4, 2003, pages 451-474

Greaves, Rosa, "Concurrent Jurisdiction in EEC Competition Law: When should a National Court Stay Proceedings?", *European Competition Law Review*, Volume 8 No 3, 1987, pages 256-272

Jaqué, Jean-Paul, "The Principle of Institutional Balance", *Common Market Law Review*, Volume 41 Issue 2, pages 383-391

Jones, Clifford A., "After the Green Paper: The Third Devolution in European Competition Law and Private Enforcement", *The Competition Law Review*, Volume 3 Issue 1, 2006, pages 1-3

Jones, Clifford A.; Sharpston, Eleanor, "Beyond Delimitis: Pluralism, Illusions, and Narrow Constructionism in Community Antitrust Litigation", *Columbia Journal of European Law*, Volume 3, 1996-97, pages 85-108

Kearney, Joseph D.; Merrill, Thomas W., "The Influence of Amicus Curiae Briefs on the Supreme Court", *University of Pennsylvania Law Review*, Volume 148 No 3, 2000, pages 743-855

Komninos, Assimakis P., "Effect of Commission Decisions on Private Antitrust Litigation: Setting the Story Straight", *Common Market Law Review*, Volume 44 Issue 5, 2007, pages 1387-1428

Komninos, Assimakis P., "New Prospects for Private Enforcement of EC Competition Law: Courage v. Crehan and the Community Right to Damages", *Common Market Law Review*, Volume 39 Issue 3, 2002, pages 447-487

Kjølbye, Lars, "Case C-344/98 Masterfoods" (case note), *Common Market Law Review*, Volume 39 Issue 1, 2002, pages 175-184

Lenaerts, Koen; Gerard, Damien, "Decentralisation of EC Competition Law Enforcement: Judges in the Frontline", *Journal of World Competition*, Volume 27 No 3, 2004, pages 313-349

Levitt, Matthew, "Delimitis and De Minimis" (case note), *European Competition Law Review*, Volume 15 No 5, 1994, pages 283-285

Maher, Imelda, "Regulation and Modes of Governance in EC Competition Law: What's New in Enforcement?", *Fordham International Law Journal*, Volume 31 Issue 6, 2007, pages 1713-1740

Malferrari, Luigi, "Neues zur Kompetenzverteilung zwischen Kommission und nationaler Gerichtsbarkeit auf dem Gebiet des Wettbewerbs und zum Verhältnis zwischen der Nichtigkeitsklage und dem Vorabentscheidungsverfahren – Anmerkungen zum Urteil des EuGH in der Rechtssache Masterfoods", *Zeitschrift für Europarecht*, Issue 4, 2001, pages 605-616

Nazzini, Renato, “Parallel and Sequential Proceedings in Competition Law: An Essay on the Modes of Interaction between Community and National Law”, *European Business Law Review*, Volume 16 Issue 2, 2005, pages 245-273

O’Keeffe, Siun, “First Among Equals: The Commission and the National Courts as Enforcers of E.C. Competition Law”, *European Law Review*, Volume 26 Issue 3, 2001, pages 301-311

Paulweber, Michael, “The End of a Success Story? The European Commission’s White Paper on the Modernisation of the European Competition Law”, *Journal of World Competition*, Volume 23 Issue 3, 2000, pages 3-48

Petch, Tolek, “Relying on Commission Decisions”, *Law Quarterly Review*, Volume 123 Issue Apr, 2007, pages 186-194

Preece, Steven, “Masterfoods v. HB Ice Cream Ltd.”, *European Competition Law Review*, Volume 22 No 7, 2001, pages 281-288

Rizzuto, Francesco, “Parallel Competence and the Power of the EC Commission under Regulation 1/2003 according to the Court of First Instance” *European Competition Law Review*, Volume 29 No 5, 2008, pp. 286-297

Sabel, Charles F.; Zeitlin, Jonathan , “Learning from Difference: The New Architecture of Experimentalist Governance in the EU”, *European Law Journal*, Volume 14 No 3, 2008, pages 271–327

Scott, Colin, “Governing Without Law or Governing Without Government? New-ish Governance and the Legitimacy of the EU”, *European Law Journal*, Volume 15 No 2, 2009, pages 160-173

Scott, Joanne; Trubek, David M., “Mind the Gap: Law and New Approaches to Governance in the European Union”, *European Law Journal*, Volume 8 No 1, 2002, pages 1-18

Slot, Piet Jan, “A View from the Mountain: 40 Years of Development in EC Competition Law”, *Common Market Law Review*, Volume 41 Issue 2, 2004, pages 443-373

Snyder, Francis, “The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques”, *The Modern Law Review*, Volume 56 Issue 1, 1993, pages 19-54

Szyszczak, Erika, “Experimental Governance: The Open Method of Coordination”, Volume 12 No 4, 2006, *European Law Journal*, pages 486–502

Tridimas, Takis, “Knocking on Heaven’s Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure”, *Common Market Law Review*, Volume 40 Issue 1, 2003, pages 9-50

Venit, James S., “Brave New World: The Modernization and Decentralisation of Enforcement under Articles 81 and 82 of the EC Treaty”, *Common Market Law Review*, Volume 40 Issue 3, 2003, pages 545-580

Wils, Wouter P. J., "EU Antitrust Enforcement Powers and Procedural Rights and Guarantees", *Journal of World Competition*, Volume 34 No 2, 2011, pages 189-213

Wils, Wouter P. J., "The Relationship between Public Antitrust Enforcement and Private Actions for Damages", *Journal of World Competition*, Volume 32 No 1, 2009, pages 3-26

Wißman, Tim, "Decentralised Enforcement of EC Competition Law and the New Policy on Cartels", *Journal of World Competition*, Volume 23 No 2, 2000, pages 123-154

Wright, Kathryn, "Binding the Judicial with the Administrative: Some Aspects of the European Commission's White Paper on Damages Actions for Breach of EC Antitrust Rules", *European Current Law Monthly Digest*, 2008, pages xxii-xxvi

Wright, Kathryn, "European Commission Interventions as Amicus Curiae in National Competition Cases: The Preliminary Reference in X BV", *European Competition Law Review*, Volume 30 No 7, 2009, pages 309-313

Wright, Kathryn, "European Commission Opinions to National Courts in Antitrust Cases: Consistent Application and the Judicial-Administrative Relationship", Centre for Competition Policy Working Paper, 08-24, 2008

Wright, Kathryn, "The European Commission's Own 'Preliminary Reference Procedure' in Competition Cases?", *European Law Journal*, Volume 16 No 6, 2010, pages 736-759

Books

Amato, Giuliano; Ehlermann, Claus-Dieter, *EC Competition Law – A Critical Assessment*. 2007, Oxford and Portland Oregon: Hart Publishing

Bast, Jürgen; Bogdandy, Armin von, *Principles of European Constitutional Law*. 2nd Edition 2010, Oxford: Hart Publishing; München: Verlag CH Beck

Beutler, Bengt; Bieber, Roland, *Die Europäische Union: Rechtsordnung und Politik*. 4th Edition 2001, Baden-Baden : Nomos

Bevir, Mark (ed) *Encyclopaedia of Political Theory*. 2010, Thousand Oaks, CA: SAGE Publication

Biondi, Andrea; Eeckhout, Piet; Flynn, James, *The Law of State Aid in the European Union*. 2005, Oxford: Oxford University Press

Blanco, Luis Ortiz (Ed.), *EC Competition Procedure*. 2nd Edition 2006, Oxford: Oxford University Press

Blanke, Hermann-Josef; Mangiameli, Stelio (eds.) *The European Union after Lisbon – Constitutional Basis, Economic Order and External Action*. 2012, Heidelberg: Springer

Calliess, Christian; Ruffert, Matthias, *Kommentar zum EUV/AEUV*. (eds), 4th Edition 2011, München: Verlag C. H. Beck

Craig, Paul; de Búrca, Gráinne, *EU Law – Text, Cases and Materials*. 2011, Oxford: Oxford University Press

de Búrca, Gráinne; Scott, Joanne, *Law and New Governance in the EU and the US*. 2006, Oxford: Hart Publishing

Ehlermann, Claus Dieter; Atansiu, Isabela (eds), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy*. 2001, Oxford: Hart Publishing

Geiger, Rudolf; Khan, Daniel-Erasmus; Kotzur, Markus (eds), *EUV/AEUV – Vertrag über die Europäische Union und Vertrag über die Arbeitsweise der Europäischen Union (Kommentar)*. 5th Edition 2010, München: CH Beck

Hawk, Barry E. (ed.), *Annual Proceedings of the Fordham Corporate Law Institute*. 1993, New York: Juris; Deventer : Kluwer

Hawk, Barry E. (ed), *Annual Proceedings of the Fordham Corporate Law Institute*. 2000, Yonkers, N.Y.: Juris

Jones, Alison; Sufrin, Brenda, *EC Competition Law, Text Cases and Materials*. 2nd Edition 2004, Oxford: Oxford University Press

Jones, Clifford A., *Private Enforcement of Antitrust Law in the EU, UK and USA*. 1999, Oxford: Oxford University Press

Komninos, Assimakis P., *EC Private Antitrust Enforcement – Decentralised Application of EC Competition Law by National Courts*. 2008, Oxford and Portland Oregon: Hart Publishing

Lenaerts, Koen; Van Nuffel, Piet, *European Union Law*. 3rd Edition 2011, London: Sweet & Maxwell

Middleton, Kirsty, *Cases and Materials on UK and EC Competition law*. 2nd Edition 2009, Oxford: Oxford University Press

Nazzini, Renato, *Concurrent Proceedings in Competition Law – Procedure, Evidence and Remedies*. 2004, Oxford: Oxford University Press

Senden, Linda, *Soft Law in European Community Law*. 2004, Oxford and Portland Oregon: Hart Publishing

Smit, Hans; Herzog, Peter E., *The Law of the European Community: A Commentary on the EEC Treaty*. Volume 5 2005, New York: Matthew Bender

van Bael, Ivo; Bellis, Jean-François, *Competition Law of the European Community*. 5th Edition 2010, Alphen aan den Rijn: Kluwer Law International

von der Groeben, Hans; Schwarze, Jürgen (eds), *Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft (Kommentar)*. 6th Edition 2003, Baden-Baden: Nomos

Treaties

Charter of Fundamental Rights of the European Union, OJ C 83/389, 30 March 2010

Consolidated Version of the Treaty on the Functioning of the European Union, OJ C 115/57, 9 May 2008

Consolidated Version of the Treaty on the European Union, OJ C 115/13, 9 May 2008

Treaty Establishing the European Coal and Steel Community, 1951, 261 U.N.T.S. 140

Secondary Legislation

Commission Regulation (EC) No. 800/2008 Declaring Certain Categories of Aid Compatible with the Common Market in Application of Article 87 and 88 of the Treaty (General Block Exemption Regulation), OJ L 214/3 (2008)

Commission Regulation (EC) No. 1998/2006 on the Application of Articles 87 and 88 of the Treaty to De Minimis Aid, OJ L 379/5 (2006)

Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 04.01.2003, p.1

Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters

EEC Council Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty, OJ 1962/204

Notices

European Commission, Commission Notice on the Enforcement of State Aid Law by National Courts, OJ 2009 C 85/01

European Commission, Commission Notice on the Co-operation between the Commission and the Courts of the EU Member States in the Application of Articles 81 and 82 EC, OJ C 101, 27.4.2004

European Commission, White Paper on European Governance, COM(2001) 428 Brussels, 25.7.2001

European Commission, White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, OJ C 132/1 (1999)

European Commission, Commission Notice on Cooperation between National Courts and the Commission in the State Aid Field, OJ C 312, 23.11.1995

Consultation Documents

European Commission, State Aid Scoreboard, Spring 2011 Update, 22.6.2011, COM(2011) 356 final, p. 53

European Council Conclusions, June 2010

State Aid Action Plan, Less and Better Targeted State Aid: A Roadmap for State Aid Reform 2005-2009, COM(2005)107 final

European Commission, Staff Working Paper: Reform of Regulation 17 – The Proposal for a New Implementing Regulation – Article 16(3) Submissions as Amicus Curiae, 13.11.2001, SEC (2001) 1827

Lisbon European Council, Presidency Conclusions, 24 March 2000 (Lisbon Strategy 2000)

Studies and Reports

European Commission Annual Report on Competition Policy 2010, COM(2011) 228 final

European Commission Annual Report on Competition Policy 2009, COM(2010) 282 final

European Commission Annual Report on Competition Policy 2008, COM(2009) 374 final

European Commission Annual Report on Competition Policy 2007, COM(2008) 368 final

European Commission, Annual Report on Competition Policy 2006, COM(2007) 358 final

European Commission; DG Comp, Study on the Enforcement of State Aid Law at National Level, March 2006

European Commission, Annual Report on Competition Policy 2005, SEC (2006) 761 final, 15 June 2006

European Commission, Supplement to the Report on Competition Policy 2005

European Commission, Annual Report on Competition Policy 2004 Vol 1, SEC(2005) 805 final

CONV 424/02, Final Report of Working Group IX on Simplification, Brussels, 29 Nov 2002

Monti, Mario, European Commissioner for Competition Policy, "Antitrust in the US and Europe: A History of Convergence", Speech at General Counsel Roundtable American Bar Association Washington DC, 15.11.2001, SPEECH/01/540

Other

Decision of the European Parliament and Council, [2008] OJ L218/82

DG Comp Homepage at: http://ec.europa.eu/competition/court/antitrust_requests.html (last used: 04. Mai 2012).

Proposal for a Council Regulation on the Implementation of the Rules on Competition laid down in Articles 81 and 82 of the Treaty, COM(2000) 582 final

Commission Decision 99/474/EC of 16 June 1999 Scottish & Newcastle [1999], OJ L186/28

Commission Decision 1999/473/EC of 16 June 1999 Bass Holding Ltd, Bass Lease [1999], OJ L186/1

Commission Decision 99/230/EC of 24 Feb. 1999 Whitbread [1999], OJ L88/26

DG Comp Document, "White Paper on Reform of Regulation 17 – Summary of the Observations from 29.02.2000"

DG Comp, Overview of the Application of the EC Competition Rules by National Courts in 2006

Protocol (No 3) on the Statute of the Court of Justice of the European Union from 30.3.2010, OJ C 83/210

Table of Cases

General Court

Case T-24/90 *Automec* v *Commission II* [1992] ECR I-2223

Case T-353/94 *Postbank* [1996] ECR II-921

Case T-65/98 *Van den Bergh Foods* v *EC Commission* [2003] ECR II-4653

Case T-289/01 *Der grüne Punkt* [2007] ECR II-1691

Case T-28/02 *First Data Corp., FDR Ltd and First Data Merchant Services Corp.* v *EC Commission* [2005] ECR II-4119

Case T-398/07 *Kingdom of Spain* v *European Commission* [2012] ECR n.y.r.

Court of Justice of the European Union

Joined Cases 1-57 and 14-57 *Société des usines à tubes de la Sarre* v *High Authority of the ECSC* [1957] ECR 105

Case 14/68 *Walt Wilhelm* [1969] ECR 1

Case 127/73 *Belgische Radio en Televisie and société belge des auteurs, compositeurs et éditeurs* v *SV SABAM and NV Fonior* [1974] ECR 51

Case 33/76 *Rewe* [1976] ECR 1989

Case 45/76 *Comet* [1976] ECR 2043

Case 106/77 *Simmenthal* [1978] ECR 629

Joined Cases 253/78 and 1 to 3/79 *Giry and Guerlain* [1980] ECR 2327

Case 138/79 *SA Roquette Frères* v *Council* [1980] ECR 3333

Case 158/80 *Rewe* [1981] ECR 1805

Case 283/81 *CILFIT* [1982] ECR 3415

Case 199/82 *San Giorgio* [1983] ECR 3595

Case 79/83 *Harz* [1984] ECR 1921

Case 314/85 *Foto-Frost* v *Hauptzollamt Lübeck-Ost* [1987] ECR 4199

Case C-142/87 *Belgium* v *Commission* ('Tubemeuse') [1990] ECR I-959

Case C-301/87 *France* v *Commission* ('Boussac') [1990] ECR I-307

Case C-2/88 *Zwartveld and Others* [1990] ECR I-3365

Case 68/88 *Commission* v *Greece* [1989] ECR 2965

Case C-70/88 *Parliament* v *Council* [1990] ECR I-2041

Case C-322/88 *Grimaldi* v *Fonds des maladies professionnelles* [1989] ECR 4407

Case C-213/89 *The Queen* v *Secretary of State for Transport, ex parte: Factortame Ltd and others* [1990] ECR I-2433

Case C 234/89 *Delimitis* [1991] ECR I-935.

Case C-260/89 *ERT* [1991] ECR I-2925

Joined Cases C-6/90 and C-9/90 *Francovich* [1991] ECR I-5357

Case C-354/90 *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others* v *France* [1991] ECR I-5505

Opinion 1/91 of the Court of 14.12.1991 delivered pursuant to the second subparagraph of Article 228 (1) of the Treaty (EEA Report) [1991] ECR I-6079

Case C-17/91 *Lornoy and Others* v *Belgian State* [1992] ECR I-6523

Case C-219/91 *Criminal proceedings against Ter Voort* [1992] ECR I-5485

Case C-271/91 *Marshall* [1993] ECR I-4367

Case C-128/92 *HJ Banks & Co Ltd* v *British Coal Corp* [1994] ECR I-1209

Case C-188/92 *TWD Textilwerke Deggendorf GmbH* v *Bundesrepublik Deutschland* [1994] ECR I-833

Case C-387/92 *Banco Exterior de España* v *Ayuntamiento de Valencia* [1994] ECR I-877

Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029

Joined Cases C-319/93, C 40/94 and C-224/94 *Cornelis van Roessel and others* v *Campina Melkunie* [1995] ECR I-4471

Joined Cases C-430/93 and C-431/93 *van Schijndel* [1995] ECR I-4705

Case C-39/94 *SFEI and Others* [1996] ECR I-3547

Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417

Case C-282/95 P *Guérin Automobiles* v *Commission* [1997] ECR I-1503

Case C-231/96 *Edis* [1998] ECR I-4951

Joined Cases C-110/98 to C-147/98 *Gabalfrisa and Others* [2000] ECR I-1577

Joined Cases C-174/98 P and C-189/98 P *Gerard van der Wal* v *Commission* [2000] ECR I- 1

Case C-344/98 *Masterfoods* [2000] ECR I-11369

Case C-453/99 *Courage Ltd* v *Crehan* [2001] ECR I-6297

Case C-516/99 *Schmid* [2002] ECR I-4573

Case C-17/00 *De Coster* [2001] ECR I-9445

Case C-94/00 *Roquette Frères* [2002] ECR I‑9011

Case C-275/00 *Commission* v *First NV and Franex NV* [2002] ECR I-10943

Case C-453/00 *Kühne & Heitz NV* v *Produktschap voor Pluimvee en Eieren* [2004] ECR I-837

Joined Cases C 465/00, C 138/01 and C-139/01 *Österreichischer Rundfunk* [2003] ECR I-4989

Joined Cases C-261/01 and C-262/01 *Van Calster and Cleeren* [2003] ECR I-12249

Case C-308/01 *GIL Insurance and Others* [2004] ECR I-4777

Case C-418/01 *IMS Health* [2004] ECR I-5039

Case C-53/03 *Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others* v *GlaxoSmithKline plc and GlaxoSmithKline AEVE* [2005] ECR I-4609

Case C-234/04 *Rosmarie Kapferer v Schlank & Schick GmbH* [2006] ECR I-2585

Case C-237/04 *Enirisorse* [2006] ECR I-2843

Case C-368/04 *Transalpine Ölleitung* [2006] ECR I-9957

Case C-119/05 *Ministero dell'Industria, del Commercio e dell'Artigianato* v *Lucchini SpA* [2007] ECR I-6199

Case C-2/06 *Willy Kempter KG* v *Hauptzollamt Hamburg-Jonas* [2008] ECR I-411

Case C-133/06 *Parliament* v *Council* [2008] ECR I-3189

Case C-199/06 *CELF* [2008] ECR I 469

Joined Cases C-95/07 and C-96/07 *Ecotrade SpA* [2008] ECR I-3457

Case C-429/07 *Inspecteur van de Belastingdienst* v *X BV* [2009] ECR I-4833

Case C-542/08 *Friedrich G. Barth* v *Bundesministerium für Wissenschaft und Forschung* [2010] ECR I-3189

Opinions of Advocate General

Opinion of Mr Advocate General Cosmas delivered on 16 May 2000 in Case C-344/98 *Masterfoods* [2000] ECR I-11369

Opinion of Mr Advocate General Geelhoed delivered on 14 September 2006 in Case C-119/05 *Ministero dell'Industria, del Commercio e dell'Artigianato* v *Lucchini SpA* [2007] ECR I-6199

Opinion of Mr AG Colomer in Case C-17/00 *De Coster* [2001] ECR I-9445

Opinion of Mr Advocate General Jacobs delivered on 28 October 2004 in Case C-53/03 *Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others* v *GlaxoSmithKline plc and GlaxoSmithKline AEVE* [2005] ECR I-4609

UK Courts

Case *Bernard Crehan and Inntrepreneur Pub Company CPC* [2004] EWCA Civ 637

Case *Inntrepreneur Pub Co CPC* v *Crehan* [2006] UKHL 38, [2004] EWCA Civ 637

European Court of Human Rights

European Court of Human Rights of 18 June 1971 in the Case of *De Wilde*, *Ooms* and *Versyp* v *Belgium*, Series A, No 12