

REGULATION 1/2003 AND PRIVATE COMPETITION ENFORCEMENT

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Introduction

- Private enforcement (as opposed to public enforcement) refers to actions (in nullity, in damages or for injunctive relief) brought before the MS Courts by private entities on the basis of article 101 or 102 TFEU
- While other presentations focused on the impact of Reg. 1/2003 on the public enforcement of competition rules, this presentation addresses the impact of Reg. 1/2003 on its private enforcement
- **We respectfully submit that:**
 - **Reg. 1/2003 has contributed in various respects to a more favorable environment for the private enforcement of competition rules brought by private entities before the MS Courts**
 - **The revision of Reg. 1/2003 could be an opportunity to reinforce even more vigorously the provisions favoring the private enforcement of competition rules**

There are 3 provisions in Reg. 1/2003 which address private enforcement

Recital 7

Recital 7 provides that “private enforcement” is complementary to public enforcement

*“National courts have an essential part to play in applying the Community competition rules. When deciding disputes between private individuals, they protect the subjective rights under Community law, for example by awarding damages to the victims of infringements. **The role of the national courts here complements that of the competition of the Member States.** They should therefore be allowed to apply Articles 81 and 82 of the Treaty in full.”*

1 Comment:

Recital 7 was a great step (after ECJ *Courage v. Crehan*) to acknowledge the important role of private enforcement

BUT

it might not be reflecting clearly enough the fact that the ECJ and its AG now tend to consider that public and private enforcement should be treated on an equal footing

“private’ and ‘public enforcement’ are both essential tools for strengthening the effectiveness of the policy of suppressing anticompetitive practices” (see for instance AG Pitruzella, 8/09/2022, para 93)

Article 15(1) and (2)

Article 15 (1) and (2) provide that in the context of a Court procedure, national judges may ask the European Commission (or the NCA) to provide:

1- information which is in the possession of the European Commission (or the NCA) and must be transmitted within 1 month (Art. 15(1))

2- its opinion on factual, economic or legal questions regarding the enforcement of competition rules which must be transmitted within 4 months (Art. 15(2))

2 Comments:

1- It seems that these mechanisms are rarely used (for instance, in France, at least once in *Google v. Bottins Cartographes*) BUT should be encouraged in so far as they contribute to a swift and consistent interpretation of Commission decisions

2-2 situations:

1- In follow-on cases, it is questionable that Courts prefer to ask the ECJ for a preliminary ruling rather than an opinion to the Commission (e.g. *house refuse collection trucks case- C-588/20*)

2- In stand-alone cases, such mechanisms favour consistency in cases where the Commission does not provide an *amicus curiae* on its own initiative

Article 15(3)

Art. 15 (3) provides that the NCA or Commission can submit (non-binding) observations to a court on their own initiative on issues arising out of 101 and 102 TFEU where the coherent application of EU Rules so require

To support Art. 15(3), **Art. 15(2)** provides that national courts should forward to the European Commission of any written judgment of national courts deciding on the application of Articles 101 and 102 TFEU

3 Comments:

1-It seems that this mechanism has been fruitfully used at least 20 times by the European Commission between 2006 and 2022 (e.g., in France, at least, twice before the Cour de Cassation and Cour d'appel de Paris)

2-It is to be expected that with the increasing number of stand-alone actions, the European Commission might have to submit more and more amicus curiae (unless it opens an investigation itself)

3- A public register of those submissions would provide useful guidance for all private plaintiffs

Article 16

Art. 16 provides that both NCAs and Courts cannot take decisions running counter to the decision adopted OR contemplated by the Commission.

2 Comments:

1-This provision which ensures that the Commission remains primus inter pares when applying EU Competition rules (and rightly so) is all the more relevant with the increase of parallel Commission investigations and stand-alone actions

2- Given the increase in the stand-alone cases, this provision could be usefully complemented with one clarifying that the Courts have to suspend the proceedings in every case where the Commission initiates the proceedings and may adopt a decision running counter to the assessment of the Court

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Thank you for your attention!

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