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European Competition Law Judges



*Third Session*

# **Managing a Claim in Court**

Mr Justice William McKechnie  
Judge of the Supreme Court of Ireland

Brussels: 20<sup>th</sup> November 2015

# A. What needs to be managed?

## 1. Admission to List

- Qualifying criteria.
- Monetary threshold.
- All necessary parties served/on notice:
- Issues:
  - Multiple.
  - Non Art 101/102.
  - Accept/reject.

## 2. Pleadings

- What is done/requires to be done
- Time periods for events/steps; realistic
- If out of time Registrar must reject
- Court application
- Exceptional excuses ok
- Non-exceptional excuses: reprimand/cost orders

# Pleadings (contd)

- Provide for all interlocutory matters, e.g. particulars, interrogatories, etc.
- Access to docs: is third party discovery being sought?
- Rigorous examination of necessity; available I.P? alternative evidence to same value?
- Particular care; docs on file of NCA, Commission or Public Bodies
- Particular care; docs for Leniency Programme
- Yes rigorous; not oppressive or disabling restrictive

### 3. Mop up review

- Matters still outstanding?

### 4. Pre-trial review?

- Issues of fact/law; clear and definite; general and ambiguous?
- Searching examination; more definition.
- List of Issues.
- List of Witnesses.
- Witness Statements.
- Experts to meet.
- Obligation to court
- Non binding report to court.

# 5. Model of Trial

- Pivotal issue? Substantive effect on all/no. of other major issues
- Facts/assumptions/inferences as to meaning agreed.
- Split trial
- Modular trial
- Pivotal issue: abstract question law

# Accommodation

- Lawyers
- Witnesses
- Court commitments
- Recording of hearing

# Time Limits

- Each party
- Within each party, each category of witness
- Each issue
- Direct examination
- Cross examination
- Re-examination



# Reflective Period

- Day/two days

# Closing Submissions

- Written
- Oral
- Time limits

# Judgment Delivery Date

- Yes or no

# **B. Interactions with other bodies** **– the Commission, NCAs and** **other courts**

- Why it happened?
- How it happened?: political and administration support
- Establishment of ECN: its functioning and effectiveness
- Key points of Regulation 1/2003
- Informal Contact/Communication

# Participants:

- The Commission (Comm.) and NCAs/Network
- The Commission and National Courts (Nat. Cts)
- Nat. Cts and NCAs/Network
- CJEU/General Court and Nat. Cts

## **Interaction At:**

- Formal level
- Informal level

# Why it Happened?:

- Comm.: as the only body with competence to apply Art. 101(3) TFEU
- Comm.: engulfed, if not submerged, with prior notifications
- Subsidiarity: display of national trust and respect
- Comm.: Prioritising major enforcement with a decisive focus on cartel activity

## What Happened? (contd): Milestone Reform:

- Council Regulation 1/2003 (adopted: 16/12/2002, effective: 01/05/2004): major reform of antitrust procedures
- Direct enforcement of Arts 101 (including Art. 101(3)) and 102 TFEU by NCAs and Nat. Cts
- Creation of the ECN:- (Recital 15) network of NCAs and the Comm. - : to apply Arts 101 and 102 in close cooperation

# What Happened? (contd):

- Introduction of formal powers of information/opinion/advice exchange
- structures to achieve coherence and enhance consistency
- Powers of investigation by Comm. (Art. 18)
  - On suspicion of restriction/distortion
  - Into any sector
- Disclosure requirements on the undertaing concerned – by simple request with limited legal formality being required



# What Happened? (contd):

- Powers of inspection
  - On production of written authorisation
  - Enter any premises
  - Examine books – take copies
  - Those who prevent or obstruct, do so under pain of penalty (Art. 23)
- NCAs – wide powers to act on Behalf Of Comm.

# Political Support 10/12/2002:

- Without which the ECN was a non-runner
- Without: a deep sense of reciprocity, based on equality, respect and solidarity, trustful cooperation between the Comm./NCAs/ECN would be non-existent
- Additional powers granted to the Comm: to be exercised with the utmost regard for the cooperative nature of the network
- Joint Declaration: Council and Comm.

# Appurtenant Documents

- 1/2003/Joint Statement: set out the underlying policy; Comm.'s Cooperation Notice with ECN, supplies the detail
- Outlining cooperative procedures in several areas; case allocation, information exchange and assistance: consistency of application and Art. 11(6)

# The Network:

- The NCA of each Member State and the Comm. (28 in total)
- Power to each NCA as per the Regulation: including Art. 101(3)
- Excluding mergers and state aid

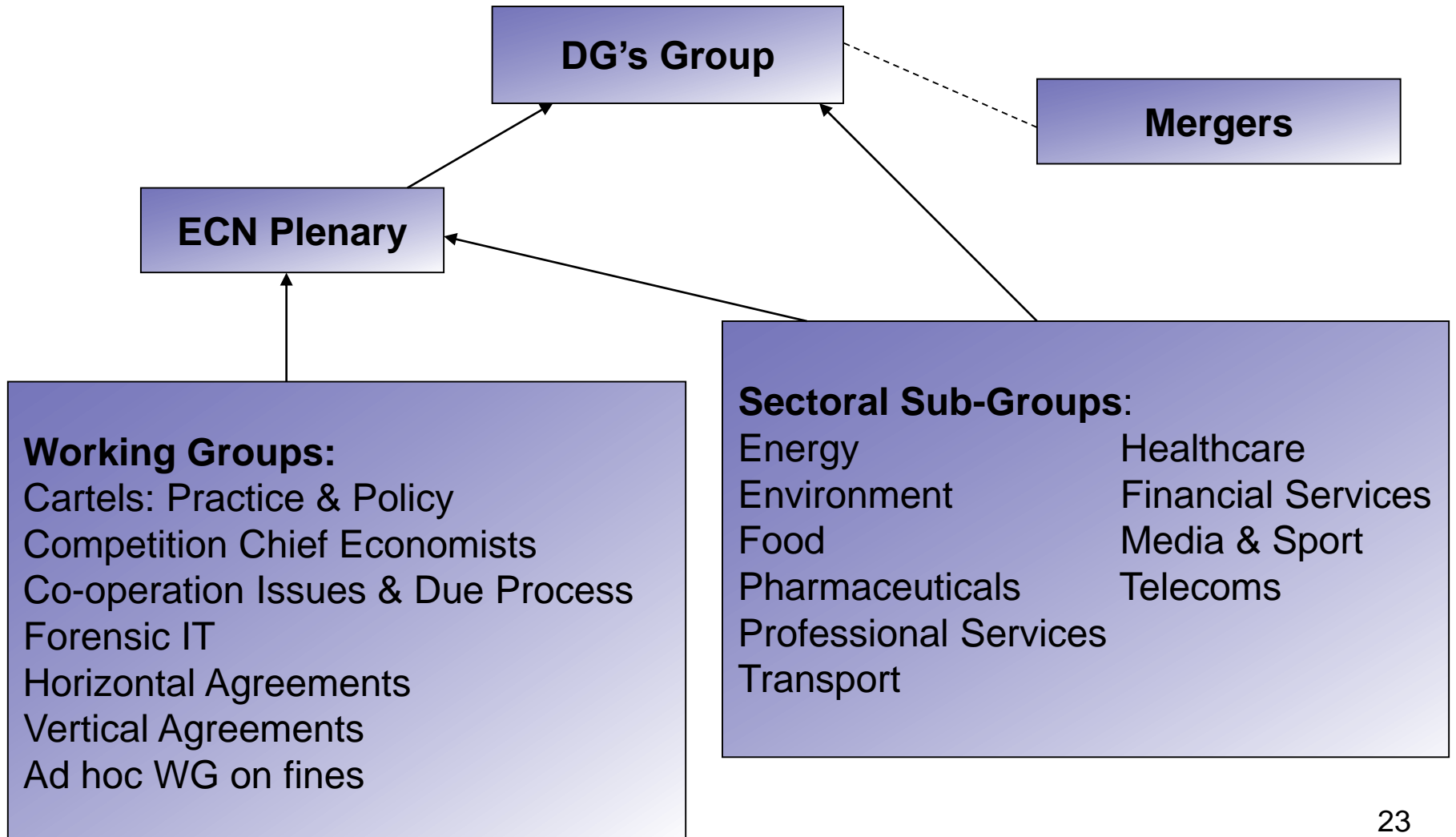
# The Network (contd):

- Must apply Community rules when Inter State trade (IST) may be affected
- Mechanisms created to ensure effective, coherent and consistent enforcement of such rules
- Provision made to avoid conflict with established EU competition law.

# Achieving Such Objectives:

- Close cooperation in both directions, between NCAs and the Comm.:
- Information exchange: between the Comm. and each NCA and between NCAs of Member States
- Coordination in detecting cross-border practices distrustful of healthy competition
- Essential to ensure consistency and coherence

# Structures:



# Essential provisions of Regulation

1/2003:

- Designation of NCAs; obligation of effective compliance; can include courts (Art.35)
- Duty of NCAs to apply Arts. 101/102 TFEU, including Art. 101(3) TFEU: (Art.5)
- Duty of national courts to apply Arts. 101 and 102 TFEU (Art. 6)



# Essential provisions of Regulation

## 1/2003 (contd):

- Power of Comm.: Finding and Termination of infringements: (Art. 7), Interim Measures (Art. 8): Binding Commitments (Art. 9) and disapplying Arts 101 and 102 (Art. 10)
- Cooperation between; Comm. and NCAs, Comm. and Nat. Cts; between Nat. Cts and the Network
- Relationship between EU and national competition laws (Art.3)

## Close Cooperation: Comm./NCAs/ECN (Art. 11):

- In application of community competition rules
- Comm.: documents transmitted to NCAs: duty to so do when applying Arts 7-10 and Art. 29(1) (Art. 11(2))
- Comm.: On request transmit further documents NCAs as necessary for assessment of case

# Close Cooperation: Comm./NCAs/ECN (Art. 11) (contd):

- NCAs: Notification of investigations to Comm. (Art. 11(3))
- NCAs: Notification of envisaged decisions to Comm. (Art. 11(4))
- NCAs/Comm.: consult on any issue regarding community law (Art. 11(5))

## Disablement Option:

- Relieving NCAs of competence to apply Arts 101 and 102 (Art. 11)

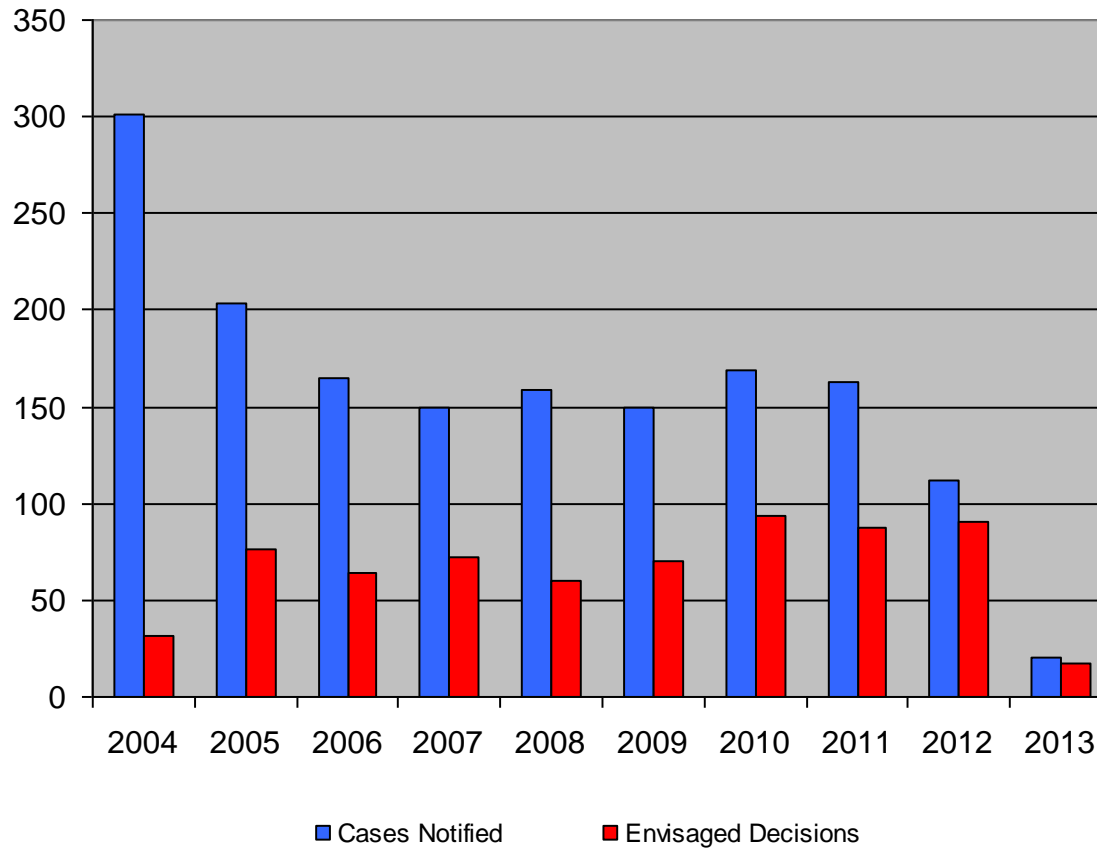
# Investigations: Notification of: (Article 11(3)):

- Number notified to end March 2013: 1,592
- Division of work:
  - “*system of parallel competences*” (so cases can be dealt with by single NCA, several NCAs or COM)
  - 2 month case allocation period
  - Normally, the NCA which starts the case will remain in charge; where re-allocation is necessary, the aim will be to re-allocate to a single “well-placed” competition authority
  - Procedures to ensure that this operates quickly and efficiently

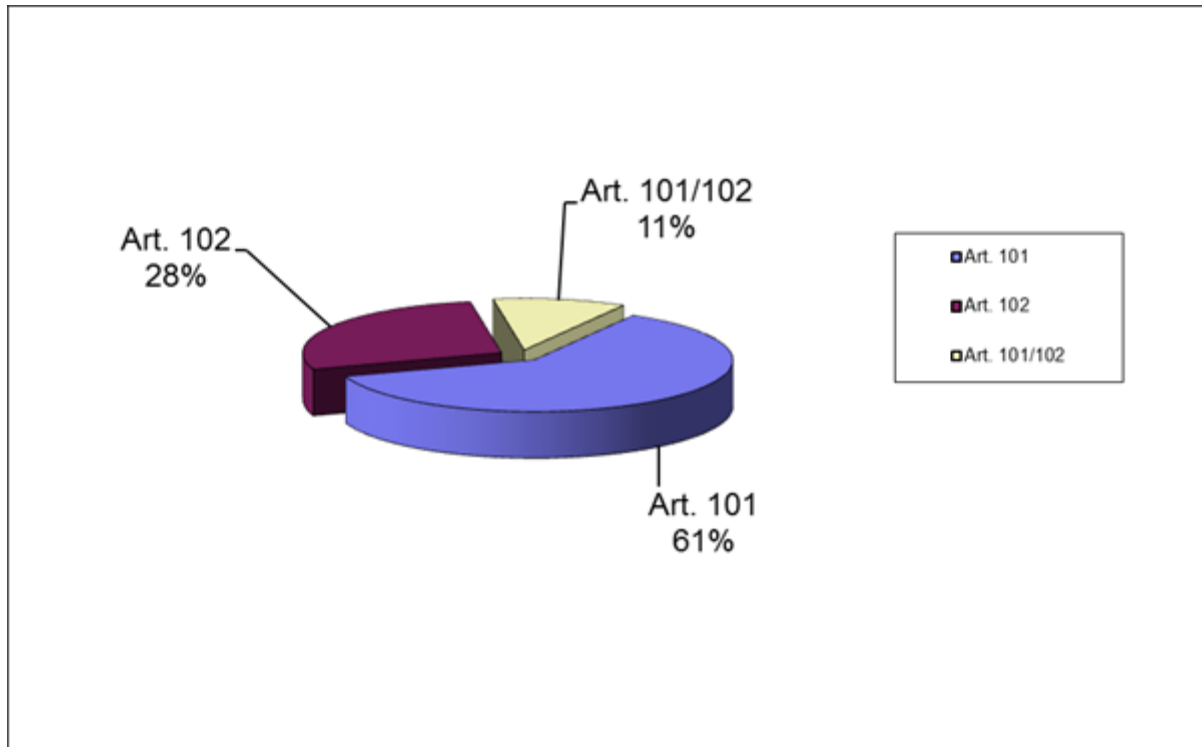
# Contemplated Decisions: Notification of (Art. 11.4):

- Number notified to date: 663
- NCAs: at least 30 days before, adopting decisions (i) requiring an infringement to be brought to an end (ii) accepting commitments or (iii) withdrawing the benefit of a BER, must inform the Comm.;
- Nat. Cts (if NCA): similar requirement
- NCAs may share with fellow network members
- Comm.: may raise questions/objections & if necessary open proceedings and relieve the NCA of its competence (see Art. 11(6))

# Notified investigations/envisaged decisions May 2004-Mar 2013:

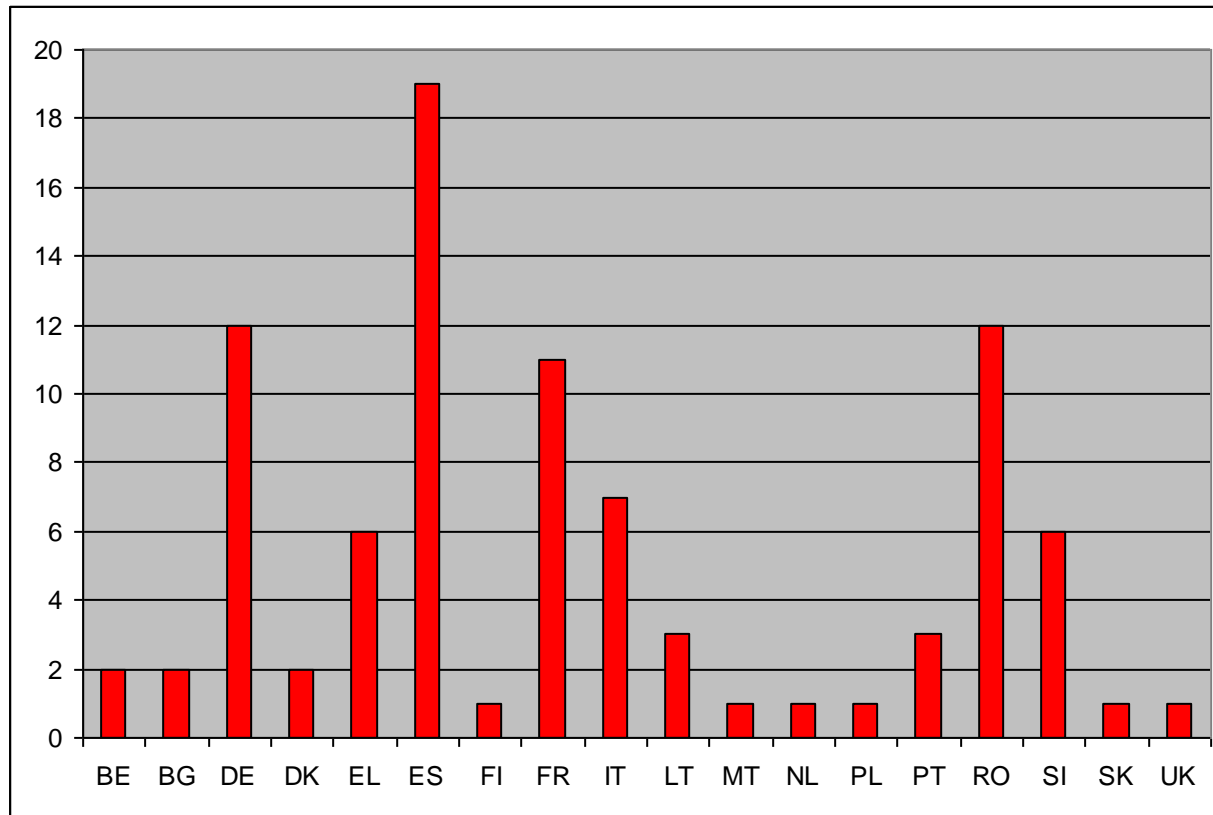


# Envisaged decisions by type of infringement in 2012:





# Envisaged decisions by Member State in 2012:



# Exchange of information (Art. 12):

- Power to exchange information NCAs/Comm.
- Covers all information both of fact and of law including confidential information (save for legal professional privilege)
- May be used as evidence in applying Arts 101/102 and their equivalent domestic provisions but only where the outcome is not dissimilar
- May likewise be used to impose sanctions on natural persons but only if certain conditions are satisfied

# Assistance with Investigations (Art. 22)

- NCAs may engage in fact finding exercises (inspections etc) in their own territories for other NCAs
- NCAs shall undertake inspections (premises: dwelling houses, land and all transport vessels) at the request of the Comm.
- But under and in accordance with Nat. Cts, both substantive and procedural
- Transmit such information to the requesting NCA or Comm.
- Detailed procedures are set out in the Internal Cooperation Manual

# Cooperation Avenues: Comm. and Nat. Cts:

## **Basis for cooperation:**

- Mutual duty of loyal cooperation (Art. 4(3) TEU)
- 1/2003: Mechanisms to promote consistency: elaborated in the Commission Notice on cooperation with the Nat. Cts (2004/C 101/04)
- When providing assistance to the Nat Ct when it applies EU competition rules the Comm.:
  - respects the independence of the Nat. Cts
  - remains neutral and objective
  - provides it as part of the duty to defend the public interest
  - does not hear any of the parties regarding its assistance to the Nat. Cts

# Art. 15 Regulation 1/2003

## **15 (1) Requests for information [1]:**

- Enables: Nat. Cts to request the Comm. to transmit to them documents in its possession and furnish procedural information (state of the proceedings etc.), before the Comm.
- Exceptionally: overriding considerations may lead the Comm. to refuse if:
  - necessary for the safeguarding of the Union interests, functioning and independence or
  - requested information is covered by professional secrecy (Art. 339 TFEU) and the respective national court is not able to guarantee protection of confidential information and business secrets

## 15 (1) Requests for opinion [1]:

- Nat. Cts may request the Comm.'s opinion on questions concerning the application of EU competition rules
- Such opinions are not legally binding
- Nat. Cts retain the right to utilise Art.267 TFEU
- The Comm. provides the Nat. Cts with the factual information or economic or legal clarification asked for, without entering into the merits of the case pending before it.
- The Comm. may request such information as necessary to provide its opinion

## 15 (1) Requests for opinion [2]:

- Frequent use made of such facility
- Opinion sought on wide range of issues e.g., questions concerning market definition, qualification of a practice as an abuse, applicability of Art. 101(3) to agreements restrictive of competition, etc.
- From 2004 to July 2014, 28 such opinions have been provided
- The majority have been sought by courts of first instance
- The Comm. has a strong desire to publish those opinions: it seeks permission from the Nat. Cts to do so
- By now it has published 18 opinions

# Art. 15 (3): Amicus Curiae:

- The Comm. has so far participated on **15 occasions and in 9 Member States**: France, Belgium, Slovakia, Austria, the Netherlands, the UK, Ireland, Spain and Germany
- Most interventions have been made before courts of last instance (10). The remaining interventions were before appeal courts (3) and first instance courts (2)
- The Comm. is deeply anxious to publish its observations on its website: it seeks permission from the Nat. Cts to do so
- Since 2004, 11 amicus curiae observations have been published



# Art. 15(3): Basis for intervention

- This provision empowers the Comm. to intervene on its own initiative whenever the coherent application of Arts 101 and 102 so requires
- The CJEU has said that such intervention may take place even if the litigation concerns non-competition rules (e.g. rules on tax deductibility of fines), the application of which may have an impact on the effective and coherent enforcement of the competition rules - Case C 429/07 *Inspecteur van de Belastingdienst v. X B.V.*

## Art. 15(3): Submissions:

- To date; have been made on a wide range of issues e.g., tax deductibility of cartel fines, protection of access to leniency documents in actions for damages before the national civil court, interpretation of the notions of appreciable effect on trade between Member States, the application of Art. 101 to vertical agreements
- commercial behaviour in different sectors e.g., telecommunications, energy, motor vehicles, basic industries

# Art. 15(3): Submissions (contd):

- The Comm. limits its observations to an economic and legal analysis of the facts underlying the case pending before the Nat. Cts
- The Comm. may ask Nat. Cts to transmit to the Comm. a copy of all documents necessary for the assessment of the case
- Amicus curiae interventions are submitted in accordance with Member States' procedural rules and practices that should respect in particular principles of effectiveness and equivalence as well as the fundamental rights of parties involved

# Art. 15(3): Submissions (contd):

## **Respectful use of facility:**

- The Comm. has used this instrument to provide assistance to Nat. Cts in the application of EU competition rules in order to foster a coherent application of those rules throughout the Member States
- Observations have provided an opportunity to the Comm. to clarify the approach it takes, often on novel issues
- Most observations have been directly acted upon by the Nat. Cts which in many instances have sought preliminary rulings pursuant to Art. 267 TFEU and thereby contributed to clarifications of the law (e.g. C 681/11 *Schenker & Co. and Others* or C-439/09 *Pierre Fabre Dermo-Cosmétique SAS* where the CJEU in essence confirmed the Comm.'s views expressed in amicus curiae interventions)

## Art. 15 (2) Judgments:

- Imposes an obligation on the Member States to forward to the Comm. copies of any written judgment concerning the application of Arts 101 and 102 TFEU
- The Comm. has received around 380 judgments, primarily from courts in Spain, Germany and France. About ten Member States have not sent for publication any judgment yet to the Comm.

# Art. 16:

- Nat. Cts cannot adopt decisions which conflict with those of the Comm. (both actual and envisaged) relating to the same parties and subject matter
- Possibility/obligation to stay proceed
- If the Nat. Cts intends to take a decision that runs counter to that of the Comm., it must refer the question to the CJEU for a preliminary ruling (Art. 267) to decide on the compatibility of the decision with EU law

# Contact and Communication: Informal Level:

- **Members of Nat. Cts and NCAs via:**
  - Personal friendship
  - Membership of professions/academic books
  - Conferences; seminars; workshops; lectures
  - Research for shared publications
- **Comm. and national judges via:**
  - Association of European Competition Law Judges
  - Associations of other legal sectors such as I.P. law

# Regulation 1/2003: Experience to date

- Ten years of antitrust enforcement
- Achievements and future perspectives
- Commission's communication to Parliament and Council (July 2014)



# C. Jurisdiction/ Staying Proceedings

- 1968 Brussels C/v: recognition and enforcement of judgments in civil and commercial matters
- 2001 Regulation (EC) 44/2001:
- 2009: Commission adopts report on application of 44/2001
- Improvement desirable
- 2012: Brussels Regulation (Recast)

# Scope

- Civil and commercial matters
- Whatever the adjudicating body might be
- Exclusions
- Arbitration
- Non-mainland territories of Member States
  - France
  - Spain
- Article 355/349

# Main Provisions

- Sue where defendant is domiciled (Article 4)

# Special Jurisdiction (Articles 7-9)

- Option to sue in the defendant's non-domiciliary State
- Contract: where place of the performance of the obligation in question is to take place
- Tort: where the harmful event occurred or may occur
- Disputes re: branch/agencies where established

# Exclusive Jurisdiction (Article 24)

- Proceedings: object: rights in *rem* in immovable property (land)
- Dissolution/reorganisation of companies
- Registration/validity of patents, trademarks etc. (I.P. rights)

# Prorogation of Jurisdiction (Articles 25-26)

- Parties can choose jurisdiction unless:
- Agreement null and void under law of that jurisdiction

# Examination/Jurisdiction/ Admissibility

- If another Member State is *seised* of C/A: all others must decline jurisdiction
- Exclude in a non-domiciliary State: if no appearance is entered: court must decline jurisdiction unless otherwise available under the Regulation
- Stay of proceedings: if papers not properly served

The Rome Regulation (EC No 593/2008) on the law applicable to contractual obligations (Rome I)

- Be mindful/though not overly concerned



The Rome Regulation (EC No 864/2007) on the law applicable to non-contractual obligations (Rome II)

- Be mindful/though not overly concerned