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The Relationship between the EC Competition Rules and National Competition Laws

(A developmental approach with regards to supremacy)

In the field of Competition Law, the European Union and the Member States (MSs) have parallel competencies; this derives from the dualism of Competition Law. Nevertheless, EU Competition Law may pre-empt national competition laws to a certain extent.

In the case of a conflict between national and Community competition laws, since 1969, the general rule is that Community law should prevail.¹ While both Community and domestic competition law can apply, domestic law cannot be applied in a way which infringes the principle of supremacy of Community law.²

Furthermore, by virtue of the loyalty clause of Art. 10 of the EC Treaty MSs have to refrain from taking measures which can jeopardize the application of the competition rules, in order to facilitate the achievement of the Community's tasks and to abstain from any measure which could jeopardize the attainment of the Treaty's objectives.

Competition rules apply to both private and public undertakings.³ According to Art. 86 (1) of the EC Treaty MSs have to refrain from taking measures contrary to the competition rules of the EC with regard to public undertakings or undertakings to which they have granted special or exclusive rights. The very

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¹ Case 14/68, *Walt Wilhelm and others v. Bundeskartellamt*, *European Court Reports* (1969), 0001.

² *Supra*, par. 4, 7 and 8; and also in: Case 106/77, *Amministrazione delle Finanze Stato v. Simmenthal SpA*, *European Court Reports* (1978) 629. This is also stressed out in Art. 3 of the new regulation on the application of Art. 81 and 82 of the Treaty that puts the relationship in question into a normative form. To be detailed later.

³ Undertakings controlled by the Member State or the local authority of a Member State.

narrow limitation to the above follows in Art. 86 (2): in so far as the development of trade is not affected to such an extent as would be contrary to the interests of the Community.⁴

Seeing the *ratione materiae* and every-day application of the competition rules of the EC Treaty, the problem of the relationship of the community laws on competition and national antitrust laws becomes rather complex.

Under the first regulation on the application of Art. 85 and 86 (after the Treaty of Amsterdam: 81 and 82),⁵ Art. 85 (1) and 86 had direct effect and since they were also directly applicable, they could be relied upon by private individuals and undertakings in national courts. Moreover, like the Treaty itself—ex Arts. 88 and 89 (now Arts. 84 and 85)—, Regulation No 17 had created a regime of shared responsibilities between the Commission and the Member States in applying ex Arts. 85 and 86.

Also, the simultaneous application of national competition laws and Community rules on competition was later recognized in the case law of the European Court of Justice.

The Modernization of Competition rules by the European Commission in 2004 had introduced a few adjustments to the situation.

The paper introduces the development of the European Court of Justice's case law in this field and attempts to identify the novelties established by the modernization of the competition rules.

The Court's case law

1. The Walt Wilhelm Case, the specified primacy of EC Competition law

In the *Walt Wilhelm*⁶ case, the ECJ had established for the first time the important doctrine—of corresponding application—in relation to conflicting competencies.

The ECJ had recognized that community law and national laws approach restrictive practices from different points of view. Therefore it is possible for a National Competition Authority (NCA) to take a decision, which is already the subject matter of a case before the Commission; however this cannot

⁴ Such limitation benefits the undertakings that are entrusted with the operation of services of general economic interest.

⁵ Regulation No 17 of 1962 implementing Art. 85 and 86 of the Treaty, *Official Journal* P 13, 21 of February 1962. 0204–0211.

⁶ Case 14/68, *Walt Wilhelm and others v. Bundeskartellamt*, *European Court Reports* (1969), 0001.

prejudice the uniform application of the Community law.⁷ So, the national authority is required to take proper account of the possible effects of the decision taken by the Commission, and if it appears during the proceedings before the national competition authority that the Commission's decision will be contrary to the decision to be taken by the national authority, it should take all appropriate measures. Such an appropriate measure could be the staying of the proceedings.

The other question that was referred to the ECJ by the Kammergericht, concerned the possible risk resulting from the parallel application of Community rules and national laws and consequently the possible double sanction imposed by the Commission and the national authorities with jurisdiction in cartel matters.

The ECJ had answered this saying that the possibility of concurrent sanctions does not mean that the possibility of two parallel proceedings pursuing different ends is unacceptable. The Court further stated that the acceptability of a dual procedure of this kind follows from the special system of sharing jurisdiction between the Community and the Member States with regard to cartels. However, in these cases the general requirement of natural justice demands that every previous punitive sanction is being taken into account in determining the sanction to be imposed.⁸

In other words, the exclusion of competence of the national authorities—once the Commission has initiated proceedings—does not apply when the national authorities are acting in pursuance of their national competition laws.

Under this formulation, it was therefore—in theory—perfectly legitimate for national law to prohibit conduct which satisfied the jurisdictional criteria of Art. 81(1) but had not received an exemption under Art. 81(3) or, where the conduct in question did not infringe Art. 81(1) and therefore did not attract the sanction of nullity under Art. 81(2).

2. The “French perfume” cases

In the “*French perfume cases*”⁹ the ECJ concluded that, in the view of Arts. 2, 6, 19 (3) and 21 (1) of Regulation No 17, if the required constitutive effect is not reached by the publication of the letter as required, the MSs' national courts can

⁷ This is based on the presence of the Community Law, developed by the Court in the *Costa v. Enel* case. Case 6/64, *Costa v. Enel*, *European Court Reports* (1964), 585, also see: par. 9 of *Walt Wilhelm*, cited in 4.

⁸ Cited in 4, par. 11.

⁹ Cases 253/78 and 1–3/79, and case 37/79, detailed later.

come up with different findings with respect to their national competition laws and the facts disposed to them, as a result of the fact that community competition law is limited to actions that may affect trade between MSs.

Second, the Court had found that the initiation of the procedure by the Commission—according to Art. 9 (3) of the Regulation No 17—does not prevent national courts from adjudicating in matters related to Art. 85 (1) as a result of their obligation to guarantee the rights arising from the direct effect of the paragraph (1) of Art. 85. Furthermore, these national courts can come up with different findings on the basis of the information available to them with regard to the application of Art. 85 (1). The prerequisite for the above was still that the “initiation of the proceeding” and the “letter” by the Commission is purely administrative.

More specifically, in the *Giry, Guerlain* cases¹⁰ under ex Art. 177 (now Art. 234) the *Tribunal de Grande Instance* of Paris has submitted questions to the Court of Justice on the interpretation of Art. 85 of the Treaty. The questions arose during the criminal proceedings brought against several perfumeries under the French order No 45-1483 of June 1945 on prices on the charge of refusal to sell.

The claimants—retailers who were not part of the selective distribution system—criticized the selective distribution systems on the basis that the companies were refusing to sell to certain retailers. These companies referred to a letter that each of them had received from the DG Competition of the Commission, which stated that on the basis of the facts known to it, there was no further need for it to take action under the provision of Art. 85 (1) of the Treaty. The accused stated in the procedure that those letters of the Commission must be regarded as decisions applying Art. 85 (3) of the Treaty, therefore by the reason of pre-eminence of the Community rules, national authorities could not prohibit—by applying national law—restrictions on competition if they had been recognized as to be lawful from the point of community law.

The Court first concluded on the nature of the letters. It stated that if the Commission wants to give negative clearance pursuant to Art. 2 of Regulation No 17 or wants to take a decision in application of Art. 85 (3) of the Treaty, it is bound by the dispositions of the Regulation 17, in particular Arts. 19 (3) and 21 (1); so it has to publish the summary of the relevant application of the notification or the decision in the case of exemption under Art. 85 (3).¹¹

¹⁰ Joined cases 253/78 and 1–3/79, *Procureur de la République and others v. Bruno Giry and Guerlain SA and others*, *European Court Reports* (1980), 02327.

¹¹ *Supra*, par. 11.

In conclusion, the Court stated that these letters in question do not constitute neither negative clearance nor an exemption under Art. 85 (3) according to Arts. 2, 6, 19 (3) and 21 (1) of Regulation No 17.¹²

Furthermore, those letters were based solely upon the facts available to the Commission, and could not reflect other than the Commission's assessment of the case, and so did not prevent the national courts, before which the agreements in question were alleged to be incompatible with Art. 85 of the Treaty, from reaching a different finding on the basis of the evidence and information available to them. Important however, that although the letters do not bind the national courts, they are to be considered as factors for the national courts when deciding upon a case.¹³

In virtue of the *Walt Wilhelm* case and the above, the Court concluded its reasoning with saying that the ending of procedures by the Commission on the basis of the facts available to the it does not however prevent the national authorities from applying to those agreements the provisions of national competition law which may be more rigorous than the community rules. Moreover, if a practice has been held by the Commission not to fall within the ambit of the prohibition of Art. 85 (1) and (2)—the scope of which is limited to actions capable of affecting interstate commerce—, in no way prevents that practice from being considered by the national authorities to be incompatible with their respective national competition rules if the effects their produce are recognizable on a national scale.¹⁴

The second judgment in the “perfumes cases” was delivered on the same day. In the *Marty v. Estée Lauder* case¹⁵ the Tribunal de Commerce had asked three questions under Art. 234 of the Treaty.

The French commercial court was dealing with a case where the claimant—Marty—was complaining that the defendant had not fulfilled an order given out to them by Marty, and this practice was against the provisions of the French order on prices which prohibits a refusal to sell.

Similarly to the *Giry* and *Guerlain* cases, the referring court was interested in finding out the legal consequences of such “comfort letter”; in other words, whether it constitutes a negative clearance under Regulation No 17; and if the answer was to be affirmative to this question, could this letter be invoked in

¹² *Supra*, par. 12.

¹³ *Supra*, par. 13.

¹⁴ *Supra*, par. 18.

¹⁵ Case 37/79, *Anne Marty SA v. Estée Lauder SA*, *European Court Reports* (1980), 02481.

relation to third parties and is binding upon the courts of the Member States of the Community?

Yet, in the present case, the referring court went further and asked the ECJ about the effect of the possible negative answers to the first two questions, inquiring that which authorities were competent to enforce Art. 85 (1) of the Treaty, and subsequently, had there been a procedure initiated under Art. 9 (3) of the Regulation No 17?

The ECJ first concluded that—as in paragraph 11 of the *Giry* and *Guerlain* cases—the administrative letter stating that the Commission does not consider that there is a need for it to take action in respect of the contracts in question, and closes the procedure; does not itself mean that it has given negative clearance according to Art. 2 of Regulation No 17 or that it has taken a decision in application of Art. 85 (3) of the Treaty, since these types of decision must be published, as provided for by Art. 21 (1) of Regulation 17/62.¹⁶ As the Court further evaluated, these letters reflect the Commission’s assessment on the case, and “do not have the result of preventing national courts before which the agreements in question are alleged to be incompatible with Art. 85 from reaching a different finding as regards the agreements in question on the basis of the information available to them”.¹⁷ The reasoning continued, that even as the letter does not bind national courts, “the opinion transmitted in such letters nevertheless constitutes a factor which the national courts may take into account in examining whether the agreements ... are in accordance with the provisions of Art. 85”.¹⁸

As regard to the third question, the ECJ had referred to its previous decisions of *Sabam* and *Haecht*¹⁹ and stated that the “... jurisdiction of national courts before which the direct effect of Art. 85 (1) is relied upon is not restricted by Art. 9 (3) of Regulation No 17.”²⁰

¹⁶ *Supra*, par. 8.

¹⁷ *Supra*, par. 10.

¹⁸ *Supra*.

¹⁹ Case 127/73, *Belgische Radio en Televisie v. SV Sabam and NV Fonior*, *European Court Reports* (1974), 51; and Case 48/72, *SA Brasserie de Haecht v. Wilkin Janssen*, *European Court Reports* (1973), 77.

²⁰ Case 37/79, cited in 15, par. 16.

3. The Masterfoods case

In addition, in its *Masterfoods* judgment,²¹ the ECJ had gone further.

In the present case the Irish Supreme Court had referred to the Court of Justice for a preliminary ruling under ex Art. 177 of the EC Treaty three questions on the interpretation of Arts. 85, 86 and 222 of the EC Treaty; the questions were raised in two sets of proceedings between Masterfoods and HB Ice Cream, in connection with an exclusivity clause contained in agreements for the supply of freezer cabinets concluded between HB and retailers of impulse ice cream. The above were adverse parties on the market of ice cream.

In March 1990 Masterfoods brought an action before the High Court of Ireland seeking, *inter alia*, a declaration that the exclusivity clause by HB—requiring its retailers to keep only its products in the freezer cabinets supplied by HB—was null and void in domestic law and under Arts. 85 and 86 of the EC Treaty. HB brought a separate action for an injunction to restrain Masterfoods from inducing retailers to breach the exclusivity clause.²²

On 28 May 1992 the High Court gave judgment in the actions brought by Masterfoods and HB respectively, dismissing Masterfoods' claim and granting HB a permanent injunction restraining Masterfoods from inducing retailers to store its products in freezers belonging to HB. However, HB's claim for damages was dismissed. Masterfoods appealed against those judgments to the Supreme Court.

In parallel with those contentious proceedings, on 18 September 1991 Masterfoods lodged with the Commission of the European Communities a complaint against HB under Art. 3 of Council Regulation No 17. The complaint concerned the supply by HB, to a large number of retailers, of freezer cabinets to be used exclusively for HB products. On 29 July 1993 the Commission, in a statement of objections addressed to HB, concluded that the distribution system operated by it infringed Arts. 85 and 86 of the Treaty.

HB later altered his system and applied for exemption under Art. 85 (3), however the Commission finally found that HB could not be exempted. Consequently, HB brought an action under the fourth paragraph of ex Art. 173 of the EC Treaty for the annulment of the Commission Decision 98/531.

Under those circumstances the Irish Supreme Court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

²¹ C-344/98, *Masterfoods Ltd v HB Ice Cream Ltd; HB Ice Cream Ltd v Masterfoods Ltd*, *Common Market Law Review* 4 (2001), 14.

²² *Supra*, par. 6.

„1. In the light of the judgment and orders of the High Court of Ireland dated 28 May 1992, the decision of the Commission of the European Communities dated 11 March 1998 and the applications by Van den Bergh Foods Ltd pursuant to Arts. 173, 185 and 186 of the Treaty establishing the European Economic Community (EC Treaty) to annul and suspend the latter decision:

(a) Does the obligation of sincere cooperation with the Commission as expounded by the Court of Justice require the Supreme Court to stay the instant proceedings pending the disposal of the appeal to the Court of First Instance against the aforesaid decision of the Commission and any subsequent appeal to the Court of Justice?

(b) Does a decision of the Commission which is addressed to an individual party (and which is the subject of an application for annulment and suspension by that party) declaring such party's freezer cabinet agreement to be contrary to Art. 85(1) and/or Art. 86 of the EC Treaty thereby prevent such party from seeking to uphold a contrary judgment of the national court in that party's favor on the same or similar issues falling under Arts. 85 and 86 of the Treaty where that decision of the national court is appealed to the national court of final appeal?²³

In response to the above questions the Court concluded, *inter alia*, that the Commission, entrusted by Art. 89 (1) of the Treaty—now 85 (1)—with the task of ensuring application of the principles laid down in Arts. 85 and 86 of the Treaty, is responsible for defining and implementing the orientation of Community competition policy. It is for the Commission to adopt, subject to review by the Court of First Instance and the Court of Justice, individual decisions in accordance with the procedural rules in force and to adopt exemption regulations.

Furthermore, the Commission shares competence to apply Arts. 85 (1) and 86 of the Treaty with the national courts.²⁴

„The latter provisions produce direct effects in relations between individuals and create direct rights in respect of the individuals concerned which national courts must safeguard. The national courts thus continue to have jurisdiction to apply the provisions of Arts. 85 (1) and 86 of the Treaty even after

²³ *Supra*, par. 18.

²⁴ Case C-234/89, *Delimitis v. Henninger Bräu*, *European Court Reports* (1991), I935, par. 45.

the Commission has initiated a procedure in application of Arts. 2, 3 or 6 of Regulation No 17”²⁵.

The ECJ however found, on the basis of the division of powers, and in order to fulfill the role assigned to it by the Treaty, the Commission cannot be bound by a decision given by a national court in application of Arts. 85 (1) and 86 of the Treaty. The Commission is therefore entitled to adopt at any time individual decisions under Arts. 85 and 86 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.²⁶

The ECJ continued by referring to its previous case-law, and said that it is the Member States’ duty under Art. 5 of the EC Treaty to take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising from Community law and to abstain from any measure which could jeopardize the attainment of the objectives of the Treaty; and this obligation is binding on all the authorities of Member States respectively.

It is important to see, that the Court had held previously, in *Delimitis*,²⁷ that in order not to breach the general principle of legal certainty, national courts must, when ruling on agreements or practices which may subsequently be the subject of a decision by the Commission, avoid giving decisions which would conflict with a decision contemplated by the Commission in the implementation of Arts. 85 (1) and 86 and Art. 85 (3) of the Treaty. It is even more important that when national courts rule on agreements or practices which are already the subject of a Commission decision they cannot take decisions running counter to that of the Commission, even if the latter’s decision conflicts with a decision given by a national court of first instance.

The Court therefore has concluded, that

„... when the outcome of the dispute before the national court depends on the validity of the Commission decision, it follows from the obligation of sincere cooperation that the national court should, in order to avoid reaching a decision that runs counter to that of the Commission, stay its proceedings pending final judgment in the action for annulment by the Community Courts, unless it considers that, in the circumstances of the case, a reference

²⁵ Case 344/98, cited in 21, par. 47. In line with Case 37/79, cited in 15, par. 16.

²⁶ Case 344/98, cited in 21, par. 48.

²⁷ Case C-234/89, cited in 24, par. 47.

to the Court of Justice for a preliminary ruling on the validity of the Commission decision is warranted.”²⁸

In its final assessment, the ECJ had stated, that

„where a national court is ruling on an agreement or practice the compatibility of which with Arts. 85 (1) and 86 of the Treaty is already the subject of a Commission decision, it cannot take a decision running counter to that of the Commission, even if the latter’s decision conflicts with a decision given by a national court of first instance. If the addressee of the Commission decision has, within the period prescribed in the fifth paragraph of Art. 173 of the Treaty, brought an action for annulment of that decision, it is for the national court to decide whether to stay proceedings pending final judgment in that action for annulment or in order to refer a question to the Court for a preliminary ruling.”²⁹

Regulation 1/2003³⁰

Regulation No 1/2003 has been adopted by the Council of Ministers on 16 December 2002, and took effect on 1 May 2004; by this it replaced Regulation No 17/62 and established the procedures governing the enforcement of EC Competition Law. Followed by numerous guidelines and notices, this so called “modernization package” has brought new developments into the application of EC Competition Law.³¹

²⁸ Case 344/98, cited in 21, par. 57.

²⁹ *Supra*, par. 60.

³⁰ There are several Arts. on the new regulation. On this issue, see further, for example: Garzaniti et al: Dawn of the new era? Powers of investigation and enforcement under Regulation 1/2003. *Antitrust Law Journal* 72 (2004), 159–209.; and also in: Müller: The New Council Regulation (EC) No. 1/2003 on the Implementation of the Rules on Competition. *German Law Journal* 5 (2003), 721–740.

³¹ Commission Notice on cooperation within the Network of Competition Authorities, *Official Journal C* 101 of 27 April 2004. 43–53.; Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Arts. 81 and 82 EC, *Official Journal C* 101, of 27 April 2004, 54–64.; Commission Notice on the handling of complaints by the Commission under Arts. 81 and 82 of the EC Treaty, *Official Journal C* 101 of 27 April 2004. 65–77.; Commission Notice on informal guidance relating to novel questions concerning Arts. 81 and 82 of the EC Treaty that arise in individual cases (guidance letters), *Official Journal C* 101 of 27 April 2004. 78–80.; Commission Notice–Guidelines on the effect on trade concept contained in Arts. 81 and

The amendment to the application of the EC Competition Law, which turned it into a decentralized application, has placed the member states of the Union into the arrangement when they are expected to fully participate in the application of the community rules on competition.³² National Competition Authorities and the national courts are now unequivocally required to contribute to the application of EC rules in this field of law.

Indeed, as part of the new regulatory package on competition policy, the Commission has introduced Regulation 1/2003.³³ which has cleared up the pitch for the playing partners; however, there might be still some grounds that seem to remain obscure.³⁴

The introduction of the new regime has the added benefit of clarifying the supremacy of Community law over national law, as opposed to the traditional—but vague—formula in the *Walt Wilhelm* case that national law should „not prejudice the uniform application throughout the common market of the Community rules on competition law and of the full effect of the measures adopted in implementation of those rules”.³⁵

Today, Regulation 1/2003³⁶ deals with the relationship between Arts. 81 and 82 EC Treaty and national competition laws. As it is emphasized in the Recitals, “... In order to create a level playing field for agreements, decisions by associations of undertakings and concerted practices within the internal market, it is also necessary to determine pursuant to Art. 83 (2) (e) of the Treaty the

82 of the Treaty, *Official Journal* C 101 of 27 April 2004. 81–96.; Communication from the Commission—Notice—Guidelines on the application of Art. 81(3) of the Treaty, *Official Journal* C 101 of 27 April 2004. 97–118.

³² It is well beyond the scope of this study to describe the general alternatives of relations between „local and central, federal and state, or regional and sub-regional (and national)” laws. For the point of importance further read on the diversions of four types of regulatory mechanisms (yardstick competition, international trade, locational cooperation, and choice of law) in: Epstein, R. A. and Greve, M. S. (eds.): *Competition laws in conflict: antitrust jurisdiction in the global economy*. Washington, D. C. 2004. 31–66.

³³ Council Regulation (EC) 1/2003 of December 16, 2002, „on the implementation on the rules on competition laid down in Arts. 81 and 82 of the Treaty”, *Official Journal* L 1 of 04 January 2003. 01–25.

³⁴ As Mark Furse has put it „The relationship has been at least clarified by recent legislation but the position is not simple although a straightforward statement of basic principles may make it seem so.”, in: Furse, M.: *Competition Law of the EC and UK*. 4th ed., Oxford, New York, 2004. 43.

³⁵ Vertical restraints: new directions in EU policy. Extract from The Antitrust Review of the Americas 2004, available on: http://media.gibsondunn.com/fstore/documents/pubs/VerticalRestraints_EAR.pdf, consulted on 9 December 2005.

³⁶ Cited in 33.

relationship between national laws and the Community competition laws.”³⁷ Hereby, the EC legislator wants to make sure that agreements having a cross-border effect are treated in the same way across the EU.

1. The regulation on anti-competitive behavior

A) *To which situations do derogations of Regulation 1/2003 not apply?*

When discussing the relation of community law to national competition laws, one need to observe Art. 3 of the above piece of Community legislation, where it is unmistakably affirmed to which situations the regulation does not apply.

It is clearly stated in paragraph 3 of Art. 3, that “without prejudice to general principles and other provisions of Community law, paragraphs 1 and 2 do not apply when the competition authorities and the courts of the Member States apply *national merger control laws* nor do they preclude the application of provisions of *national law that predominantly pursue an objective different* from that pursued by Arts. 81 and 82 of the Treaty.”³⁸

The rationale behind the above rule is explained in Recital 9:

“Arts. 81 and 82 of the Treaty have as their objective the protection of competition on the market. This Regulation, which is adopted for the implementation of these Treaty provisions, does not preclude Member States from implementing on their territory national legislation, *which protects other legitimate interests* provided that such legislation is compatible with general principles and other provisions of Community law. In so far as such national legislation pursues predominantly an objective different from that of protecting competition on the market, the competition authorities and courts of the Member States may apply such legislation on their territory... This is particularly the case of legislation which prohibits undertakings from imposing on their trading partners, obtaining or attempting to obtain from them terms and conditions that are unjustified, disproportionate or without consideration.”³⁹

³⁷ *Supra*, Recital 8.

³⁸ *Supra*, Art. 3 (3).

³⁹ *Supra*, Recital 9.

As seen in Art. 3 (3), merger control had also maintained its previous “nature” given to it by Regulation 4064/89.⁴⁰ According to the above paragraph of Regulation 1/2003 and also according to Regulation 139/2004,⁴¹ when the concentration has Community dimension, the Commission pre-empts and bears responsibility for the authorization.⁴² Member States are only concerned so far as the planned merger does not reach the threshold of the Regulation and so does not qualify to be a merger with community dimension. In these cases the assessment of such fusion will be done according to the national laws on merger.

The other exception to the claimed primacy of the Community law is that

“... the regulation does not apply to *national laws which impose criminal sanctions on natural persons* except to the extent that such sanctions are the means whereby competition rules applying to undertakings are enforced.”⁴³

⁴⁰ Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, *Official Journal* L 395 of 30 December 1989. 0001–0012.

⁴¹ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, *Official Journal* L 024 of 29 January 2004. 0001–0022.

⁴² *Supra*, Art. 1, which reads:

„A concentration has a Community dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5000 million; and

(b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

3. A concentration that does not meet the thresholds laid down in paragraph 2 has a Community dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2500 million;

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

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

(d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.”

⁴³ Regulation 1/2003, cited in 33., Recital 8.

As it is foreseen and explained also in Recital 9:

“... Accordingly, Member States may under this Regulation implement on their territory national legislation that prohibits or imposes sanctions on acts of unfair trading practice, be they unilateral or contractual. Such legislation pursues a specific objective, irrespective of the actual or presumed effects of such acts on competition on the market.”⁴⁴

B) The scope of application of Regulation 1/2003

Recital 8 of the Regulation furthermore provides that

“the application of national competition laws to agreements, decisions or concerted practices within the meaning of Art. 81 (1) of the Treaty may not lead to the prohibition of such agreements, decisions and concerted practices if they are not also prohibited under Community competition law”.⁴⁵

According to Art. 3 (1) of Regulation 1/2003 the Commission not only shares the competence to apply Arts. 81 and 82 EC Treaty with the national competition authorities and national courts, but also “seeks to ensure full primacy of the Community’s over national antitrust”.⁴⁶

“Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Art. 81 (1) of the Treaty *which may affect trade between Member States* within the meaning of that provision, they shall also apply Art. 81 of the Treaty to such agreements, decisions or concerted practices.”⁴⁷

In these situations, national competition law may not prohibit the agreement in question, because according to Art. 3 (2):

„The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted

⁴⁴ *Supra*, Recital 9.

⁴⁵ *Supra*, Recital 8.

⁴⁶ Ullrich, H.: *Anti-Unfair Competition and Anti-Trust Law: a Continental Conundrum?* *EUI Working Paper, Law* (2005), 7, www.iue.it, consulted on 16 December 2005.

⁴⁷ Regulation 1/2003, cited in 33, Art. 3 (1).

practices which may affect trade between Member States but which do not restrict competition within the meaning of Art. 81 (1) of the Treaty, or which fulfill the conditions of Art. 81 (3) of the Treaty or which are covered by a Regulation for the application of Art. 81 (3) of the Treaty.”⁴⁸

Thus, it is not possible for national competition authorities to prohibit agreements that do not infringe Art. 81 (1) EC Treaty or the criteria of Art. 81 (3) EC Treaty or which are covered by a Community block exemption.

This appears to resolve the previous doubts as to the possible application of national competition law in the situation where there was a finding of non-applicability under EC Competition law.

Subsequently, a question could be asked: Since there is practically no more room for the independent application of national law in cases where EC Competition law also applies, does Art. 3 (2) represent a commanding incentive for Member States to harmonize their national competition rules with EC competition law?

The issue of placing the Community law “supra” of the national laws in view of interstate commerce, the Regulation is consistent with previous jurisprudence, but formal findings to this effect by the European Commission, at least, are likely to be rare.⁴⁹ Again, one can see the development of the case law of the ECJ from the *Walt Wilhelm* case, for the reason that by Art. 3 of Regulation 1/2003, which Art. excludes all application of stricter national law—because both Art. 81 (1) and (3) always take precedence—the relation of national and community competition rules had altered.

In line with the previous jurisprudence, the Member State authorities were free to subject restrictive practices to stricter national antitrust law unless the Commission, which in that respect had exclusive jurisdiction, had exempted the practice from the application of Art. 81 (1) by an affirmative act, which could have been either a case specific decision or a regulation exempting certain types of agreements.⁵⁰ Therefore it is no longer possible to see the equivocal interpretation by the national authorities and the Commission of the same practice with the same effects. This latter is also supported by Art. 10 of the

⁴⁸ It should be noted, however, that the incentive to harmonize in Art. 3 (2) only concerns substantive competition rules. The rules of procedure are most likely to remain national unless, harmonizing legislation is adopted at Community level.

⁴⁹ Freeman, P.: UK competition law after modernization—Lord Fletcher lectures, 15 March 2005, http://www.competition-commission.org.uk/our_role/speeches/pdf/freeman_lord_fletcher_lecture_150305.pdf, consulted on 9 December 2005.

⁵⁰ See also in: Ullrich: cited in 46., Footnote 8.

new regulation which gives to Commission the power to act on its own initiative if the case is related to Community public interest.⁵¹

In particular, Art. 3 (2) makes no reference to the need for any positive Community purpose and it makes no exceptions. The only situation in which national law can be applied in this way is where it is held that the agreements in question do not affect trade between member states.⁵²

Of course, with the empowerment of NCAs to apply EC competition law in addition to national competition law and the European Commission's giving up of its exclusive power to apply Art. 81 (3), possible conflicts between national and EC competition law may arise within.

One of the situations that gives ground for problems is that the national authorities have obligation to decide on the basis of the facts whether the case affects trade between Member States or not.⁵³

Therefore, according to the paragraph 1 of Art. 3 of the new regulation, the dividing line between the parallel application of the community rules and of the national rules is the so called "interstate commerce", and not the scope of the national/community laws.⁵⁴

⁵¹ This should be read together with Section C of Commission Notice on handling of complaints by the Commission under Arts. 81 and 82 of the EC Treaty, *Official Journal* C 101 of 27 April 2004. 65–77. This section deals with inter alia the situations when the Commission will deal with the case. Such cases are: when community public interest is at stake; competition policy on new issue arises; etc. 68.

⁵² Is this simply a rule attributing competence in antitrust matters? Does this mean that Art. 3 (2) leaves "the 'big' cases for community competition rules, and the 'small' cases are left to control by national competition law, as, indeed control over the exercise of relational market power mostly (though not necessarily) is intended to protect small and medium-sized enterprises"? See in Ullrich: cited in 43. 7., Also: Can we witness some sort of subsidiarity in Art. 3 (2) in leaving the competition policy on small industry to Member States? For example, in Hungary, the latest realignment–entry in force: 1 November 2005–of Act LVII of 1996 on the prohibition on unfair and restrictive market practices did not explicitly prove that the smaller industry is better protected, the harmonization of national law on competition directs towards the achievement of the zeal by the provisions on state aid which favors small and medium-sized enterprises, which first was introduced already in 2001. See on: <http://www.gvh.hu/index.php?id=2704&l=h>, consulted on 12 December 2005.

⁵³ The Commission has created guidelines to help the authorities in deciding whether the given case has effects on trade between MSs. Cited in 3.

⁵⁴ The Commission, seeing the not easy task of the establishment of the possible effect on trade between Member States, introduced a guideline, which was designed to help the NCAs to find the path when deciding upon the issue. In: Commission Notice, Guidelines on the effect on trade concept contained in Arts. 81 and 82, *Official Journal* C 101 of 27 April 2004. 81–96.

One could subsequently ask the question, whether there is a need for a diverse protection of the conceivably “two markets”, such as one with national scope and one with community scope, when applying the competition rules to anti-competitive measures?⁵⁵

C) The principle of subsidiarity in the view of Art. 3 (2) of Regulation 1/2003

Art. 3 (2) addresses the non-prohibition side of Art. 81 of the Treaty. It does not have to contend with the prohibition side of it because it has been dealt with in the Court’s case law. In its *Walt Wilhelm* decision, the ECJ held that an agreement cannot be declared valid under national law if it is prohibited by Community rules on competition.⁵⁶

However, what the new regulation did by introducing the above Art. is, it ensured that national laws cannot prohibit agreements that are not prohibited by Community competition rules. In other words, according to the procedural rules, when the Commission finds inapplicability under Art. 10 of Regulation 1/2003, stricter national laws cannot apply.⁵⁷

“1. Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Art. 81 (1) of the Treaty which may affect trade between Member States within the meaning of that provision, they shall also apply Art. 81 of the Treaty to such agreements, decisions or concerted practices.”⁵⁸

Indeed, by Art. 3 (2), the Council reinforced the principle of supremacy.

⁵⁵ Perhaps, this could also be pictured as the achievement of the previous National Courts Notice. See in: Notice on the cooperation between National Courts and the Commission in applying Arts. 85 and 86, *Official Journal* C 039 of 13 February 1993. 0006–0011.

⁵⁶ See in *Walt Wilhelm* case, cited in 6.

⁵⁷ Regulation 1/2003, cited in 33. Art. 10 reads:

„Where the Community public interest relating to the application of Arts. 81 and 82 of the Treaty so requires, the Commission, acting on its own initiative, may by decision find that Art. 81 of the Treaty is not applicable to an agreement, a decision by an association of undertakings or a concerted practice, either because the conditions of Art. 81(1) of the Treaty are not fulfilled, or because the conditions of Art. 81(3) of the Treaty are satisfied.

The Commission may likewise make such a finding with reference to Art. 82 of the Treaty.”

⁵⁸ Regulation 1/2003, cited in 33, Art. 3 (2).

However, the principle of supremacy in competition law is somewhat different than the general rule of supremacy developed by the ECJ, first in the *Costa v. Enel* case.⁵⁹

a) *The development of the principle of supremacy*

Since the Treaty of Rome remained silent on this issue, in the landmark case of *Costa v. ENEL case*⁶⁰ the ECJ unequivocally declared the principle of supremacy.

The Court held that unlike other international treaties, the EEC Treaty created its own legal system and the Member States thereby limited their sovereign rights—albeit within limited fields—, and have created a body of law that binds them as well as their nationals.

Therefore, unilateral actions taken by individual member states cannot supersede the Community legal system, nor can they be inconsistent with it. The ECJ had 14 years later reemphasized the principle of supremacy in its *Simmenthal-decision*,⁶¹ where it stated that,

„...any provision of a national legal system ... which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legal provisions which might prevent Community rules from having full force and effect is incompatible with those requirements which are the very essence of Community law”.⁶²

Again, this theory covers the situations in the areas where the Member States have agreed to act as a Community, therefore they limit their own national power to act, in other words; this doctrine highlights the priority of the norms of the EC law over the norms of the national legislation of Member States, i.e., the latter should not contradict the former.

With the words of the judgment of the Court in the *Costa v. ENEL* case: “The precedence of Community Law is confirmed by Art. 189, whereby a Regulation ‘shall be binding’ and “directly applicable in all member states”. This provision, which is subject to no reservation, would be quite meaningless

⁵⁹ Case 6/64, *Flamino Costa v. ENEL*, Judgment of 15 July 1964, *European Court Reports* (1964), 585.

⁶⁰ Case 6/64, cited in 57.

⁶¹ Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, Judgment of 9 March 1978, *European Court Reports* (1978), 629.

⁶² *Supra*, par. 20.

if a state could unilaterally nullify its effects by means of legislative measure which could prevail over community law.⁶³

Therefore, any conflict between a Community norm and a national norm that have the same scope of application should be sorted out by a non-application of conflicting national law, or else the claim of unified application of European law might be endangered.

b) The principle of supremacy in Competition law⁶⁴

Consequently, it was many years later reiterated in the *Michelin II* judgment of the ECJ that Community rules on competition have primacy over national competition law,⁶⁵ on the matter of the direct effectiveness of Art. 82 EC.⁶⁶

The supremacy of the Community competition laws is not only that these rules advance national laws on competition, but rather it is that the specific nature of the laws that define the application of community rules to certain practices of undertakings. This dividing line—since 1 May 2004—is the reinforced “interstate effect”.

How did the new regulation complete the specific requirement to clear up the problem of supremacy in relation to the two laws?

In the light of Art. 83 (2) (e), the Council was required to determine the relationship between national laws and the Treaty provisions on competition.⁶⁷ Following the case law of the ECJ in the *Walt Wilhelm* case—which was

⁶³ Case 6/64, *Flaminio Costa v. ENEL*, Judgment of 15 July 1964, *European Court Reports* (1964), 594.

⁶⁴ A detailed explanation of the development of the principle of supremacy in competition law is introduced by Walz, R.: *Rethinking Walt Wilhelm, or the Supremacy of Community Competition Law over National Law*. 21 (1996) *European Law Review*, 449–464.

⁶⁵ See also the Court’s findings in case C-344/98, *Masterfoods Ltd v. HB Ice Cream Ltd*; *HB Ice Cream Ltd v. Masterfoods Ltd*, *Common Market Law Review* 4 (2001), 14, par. 47.

⁶⁶ Case T-203/01, *Manufacture française des pneumatiques Michelin v Commission of the European Communities*, OJ C 304/24 of 13 December 2003, par. 112 and 166; and further in: Case 127/73, *BRT and Others* *European Court Reports* (1974), 51, paragraphs 15 and 16; Case 66/86, *Ahmed Saeed Flugreisen and Others* *European Court Reports* (1989), 803, paragraph 23; and *Irish Sugar v Commission*, Case T-228/97, *Irish Sugar v Commission* *European Court Reports* (1999), II-2969, paragraph 211.

⁶⁷ Art. 83 of the Treaty reads:

„1. The appropriate regulations or directives to give effect to the principles set out in Arts. 81 and 82 shall be laid down by the Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament.

2. The regulations or directives referred to in paragraph 1 shall be designed in particular:

... e) to determine the relationship between national laws and the provisions contained in this section or adopted pursuant to this Art..”

decided by the Court in the historical context of developing Community Competition law—, the Michelin II case and the Masterfoods judgment,⁶⁸ the Council introduced Art. 3 (2) of Regulation 1/2003, which prohibits national laws that are more lenient to be applied when the decision, practice or an agreement is prohibited under Art. 81.

The introduction of such normative rule that guarantees exclusive application of Community law abandons the possible jeopardizing effects deriving from the Walt Wilhelm doctrine.⁶⁹

However, the possibility for the Commission to call in a case if it finds that the community public interest is at stake, and also its option to define community policy⁷⁰ through the guiding role guaranteed by Arts. 11 and 16 of Regulation 1/2003, reflects the view of the Commission to transfer the supremacy of the Community rules into a quasi harmonization of national competition rules in order to assure the alike application of community competition rules across the EU.

2. The Regulation 1/2003 on abusive behavior of undertakings

Seeing the new regulation on anti-competitive behavior, it is useful to take a look at the relevant derogations on abusive behaviors. Indeed, the attitude towards abusive practices under Art. 82 of the Treaty is somewhat different.

Namely, "... where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Art. 82 of the Treaty, they shall also apply Art. 82 of the Treaty."⁷¹

Here, the dividing line of the probable effect on trade between member states is unclear. As cited, the disposition applies to *any* abuse that is prohibited by Art. 82. Furthermore, the restrictive pre-emption of the community rules expands in stating, that "... Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings."⁷²

⁶⁸ Cited in 62 and 63.

⁶⁹ That is the „insecure effect” of comfort letters to undertakings. Those undertakings that received a comfort letter stating that Art. 81 (1) cannot be applied could not be sure that their practices would not be also judged under national standards.

⁷⁰ This is also shown in the Commission Notice on the handling of complaints by the Commission under Arts. 81 and 82 of the EC Treaty, *Official Journal* C 101 of 27 April 2004. 65–77.

⁷¹ Regulation 1/2003, cited in 33, Art. 3 (1).

⁷² *Supra*, Art. 3 (2).

These stricter national laws may also include provisions which prohibit or impose sanctions on abusive behavior towards economically dependent undertakings.

By contrast to Art. 81 of the Treaty, in the case of abusive behaviors, the ability of the Member States to apply stricter national norms did not alter.

“As a matter of procedural enforcement, Commission decisions refusing to apply Art. 82 are not of an affirmative (constitutive) nature, and because as a matter of substantive law, Art. 82 prohibits only abuse and, therefore does not define or favor any forms of acceptable or desirable practices.”⁷³ This is also further specified by Art. 3 of Regulation 1/2003, as cited above.

In other words, stricter national law can be applied to single-firm conduct that does not violate Art. 82; for example, in Germany, antitrust law prohibits abusive behavior by companies with superior market power that falls short of dominance. The substantive change here is reserved, since European law already prevails over national law—on the basis of the principle of supremacy—, and national competition laws seldom apply stricter rules than the Commission.⁷⁴

Conclusion

The relationship between the EC Competition rules and national competition laws has not always been crystal clear and is still not. However, Regulation 1/2003 with its far-reaching implications for the enforcement of the EC Competition rules had somewhat cleared up the ground—if not more, at least concerning the anti-competitive behavior of market participants. Indeed, in order to spot an even clearer playing field, there is a need to achieve the same level of clarity in the field of abusive activities of dominant firms. If this cannot be achieved by central regulatory means than it is suggested that the national courts to refer questions to the ECJ for preliminary ruling, which via Art. 234 will be of assistance to interpret the community competition rules. Whether other alternative means of the harmonized procedural rules or a better enhanced judicial review of Commission decisions can parallel exist, it is also to find out.⁷⁵

⁷³ Also in: Ullrich: cited in 46, Footnote 8.

⁷⁴ See also: Falk et al.: *An Expanded European Union*. Washington Legal Foundation, (19), 2004. www.wlf.org, consulted on 12 December 2005.

⁷⁵ On these issues see: Maja Brkan (2005): Procedural aspects of private enforcement of EC Antitrust Law: An analysis from an evolutionary perspective. 28 *W. Comp.* 4: 479–507., and Laura Parret (2005): Judicial Protection after Modernisation of Competition Law. *Legal Issues European Integration* 32 (2005), 339–369.