

# GCLC – 2009 ANNUAL CONFERENCE

## *TOWARDS AN OPTIMAL ENFORCEMENT OF COMPETITION RULES IN EUROPE – TIME FOR A REVIEW OF REGULATION 1/2003?*

### **Enforcement by NCAs and the ECN**

#### **- Case Allocation -**

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- **As regards “vertical” case allocation, Regulation 1/2003 grants the Commission a privileged position within the ECN and exclude parallel proceedings at EC and national level**
- **By contrast, Regulation 1/2003 does not exclude “horizontal” parallel action on the basis of EC and/or national competition law by two or more NCAs. Cases can therefore be dealt with either by a single NCA or several NCAs in parallel or the Commission**

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- **The ECN Notice only provides vague and non-binding criteria. There was a deliberate choice to allow for flexible solutions and maintain the authorities' discretion in setting their own enforcement priorities**

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- **As a general rule, cases should be dealt with by a single authority in order to unveil the full potential of the Regulation in terms of effective and efficient enforcement**

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- **The risk of parallel proceedings and the lack of transparency in the case allocation process are incompatible with fundamental principles of Community law, such as the principle of *ne bis in idem* and due process**

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- **Parallel proceedings against the same infringement are inefficient**
  - If enforcement by a single authority is to be favoured, the rules laid down in Regulation 1/2003 appear insufficient to fulfil that objective. In particular, Article 13 does not lay down any case allocation or competence sharing rules. It simply authorizes a NCA to decline jurisdiction

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- **NCA's ought to be empowered to impose sanctions that are sufficiently effective to bring an infringement to an end for the whole Community**
  - Regulation 1/2003 should be amended in order to clearly reflect the policy choice that there shall only be one authority within the ECN dealing with every single case, the latter being defined in an objective manner;

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- the relevant authority has the power to impose effective sanctions for the whole of the Community;
- the designation of that authority should be based on transparent and unequivocal criteria subject to judicial review

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- **Parallel decisions by members of the ECN regarding the same infringement are contrary to the *ne bis in idem* principle**
  - Parallel prosecution by NCAs under Articles 81 and 82 EC;
  - Decision by the Commission and subsequent decision by an NCA based on national law.

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- **Parallel prosecution by NCAs under Articles 81 and 82 EC**
  - In line with Article 50 of the EU Charter of Fundamental Rights, and subject to Articles 12 and 22 of Regulation 1/2003, each case should be handled by a single authority

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- **Decision by the Commission and subsequent decision by an NCA based on national law**
  - clarify the issue of parallel proceedings under EC and national competition rules in the framework of the current revision of Regulation 1/2003, with due consideration to the fact that the Treaty expressly empowers the Council to define the relationship between EC and national competition rules

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- **Information on and judicial review of case allocation**
  - the case file should contain sufficient elements to identify the criteria and considerations applied in each case. This should include the history of the routing of the case and, if applicable, records of any inter-agency discussions on the question of (re-)allocation.

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- **Allocation rules should be made binding**
  - The main case allocation principles shall be included in the text of Regulation 1/2003

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**ECN best practice rules should contain guidance as to the documentation that ought to be drawn up and made available to the parties in that regard. As a corollary, the principle of the secrecy of internal network communications should be amended accordingly**

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- **Due process: transparency and the principle of equality of arms**
  - The ECN should adopt best practice rules ensuring the transparency and traceability of the case allocation process