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College of Europe
Collège d'Europe



Natolin

Global Competition Law Centre

COOPERATION BETWEEN COMPETITION AUTHORITIES AND JUDICIAL AUTHORITIES

Matthew Levitt, Lovells

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Group 5: Articles 15 and 16: The Tools Intended to Achieve Consistency in the Application of the Competition Rules by National Courts

- Drafted by:
 - Matthew Levitt and Guido Dolara, Lovells
 - Cani Fernández Vicién and Irene Moreno-Tapia, Cuatrecasas Gonçalves Pereira
 - Christoph Stadler and Daniel Graetz, Hengeler Mueller
 - Christopher Brown, Matrix Chambers
- Input from lawyers in the UK, Germany, the Netherlands, Belgium, Greece, Sweden, Denmark, Spain

Consistency in the application of EC competition law

- The fundamental role of Articles 15 and 16
- Recital 21:
"Consistency in the application of the competition rules also requires that arrangements be established for cooperation between the courts of the Member States and the Commission".
- Recital 22:
"In order to ensure compliance with the principles of legal certainty and the uniform application of the Community competition rules in a system of parallel powers, conflicting decisions must be avoided".

Article 15(1)

- Article 15(1): *national courts may ask the Commission for information in its possession or its opinion on questions relating to the application of EC competition law*
- Criticisms
 - lack of transparency
 - delay
 - contents of the opinions

Article 15(1): recommendations

- The Commission should publish its opinions
- The Commission should commit to providing its opinion within 4 months
- The Commission should express a genuine opinion on the issues at stake
- The Commission should monitor the use of its opinion by the national court

Article 15(2)

- Article 15(2): *Member States shall forward to the Commission copies of national judgments on Arts 81/82*
- The list of judgments on DG COMP's website is incomplete and out of date
- The Commission itself recognises the need for a "*more efficient and effective*" system (Staff Working Paper, para 291)

Article 15(3)

- Article 15(3):
 - NCAs may submit written or oral observations
 - *where the coherent application of Articles 81/82 so requires*, the Commission may submit written or oral observations

Article 15(3): Commission interventions

- Criticisms
 - the limited use of Article 15(3)
 - the Commission's policy on Article 15(3) – "cases that have important policy implications for the application of Articles 81 and 82" (Staff Working Paper, para 290)
 - the narrow scope of Commission interventions
 - procedural uncertainty for litigants and national courts
 - impact on the national procedure

Article 15(3): Commission interventions

- Recommendations
 - transparent criteria for exercise of Article 15(3)
 - procedural framework for litigants and national courts
 - publication of observations

Article 15(3): NCA interventions

- Some countries have adopted procedural rules governing interventions by their NCAs pursuant to Article 15(3)
- Considerable disparity in the use of Article 15(3) by NCAs
 - never used by the NCAs in France, Greece, Italy, Netherlands, Poland, Spain and Sweden
- Some NCAs intervene very often in cases relating to national competition law (eg France, Germany)

Article 15(3): NCA interventions

- Lessons from NCA interventions
 - the benefits of a clear procedural framework
 - the use of facts
 - the weight to be attached to NCA observations

Article 16

- Article 16(1): *when national courts rule on agreements under Articles 81/82 which are already the subject of a Commission decision, they cannot take decisions running counter to the Commission decision*

Article 16

- Open questions
 - the scope of the obligation
 - the correct balance between (i) the rights of defence and (ii) the uniform application of EC law
 - when to "stay" and what does this require?
- The answers to these questions are likely to be provided at a national rather than EU level (*Crehan, National Grid*)
- Recourse to Articles 15(1) and 15(3) may be appropriate in such cases *in particular*

Personal conclusion

- Considerable room for improvement
- Commitment from the Commission to more effective monitoring and use of the tools provided to ensure consistency