



EU Competition Law – Sanctions, Remedies & Procedure

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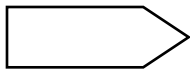
Enforcement pluralism

- Regulation of market conduct
 - EU Commission
 - General surveillance of compliance with the Treaty
 - “Trustbuster”: DG Comp
 - National Competition Authorities
 - National competition law, but also
 - EU comp rules (Reg 1 art 3 & 5)
 - Private action before ordinary courts
- Regulation of transactions:
 - One stop shop
 - If EU dimension – disapplication of national legislation

Reg. No 1 and relationship with national law

- Art. 3 & supremacy
 - **Obligation** on courts and NCA's to apply EU law where inter state trade is affected.
 - **Limitations** on the application of national law: Stricter national legislation on unilateral conduct allowed, but not on agreements / concerted practises.
 - Agreements:

Impact on interstate trade



Art 101(3) applies, or not restrictive in the sense of 101(1)



Cannot be prohibited by national legislation

- Cooperation: ECN (Article 11, 12, 13)
- Uniform application: Article 16



Function of competition law enforcement

Type Function	Public remedies (Before the Commission and NCAs)	Private remedies (Before national courts)
Termination (To bring illegal conduct to an end)	<ul style="list-style-type: none">• Interim injunction• Cease-and desist order• Structural relief	<ul style="list-style-type: none">• Interim injunctions• Final injunctions• Nullity (non-performance of contracts)
Deterrence (to prevent infringements from taking place)	<ul style="list-style-type: none">• Fines	Not a task for private parties (but damages may serve this end)
Compensation	Not a task for public bodies	<ul style="list-style-type: none">• Restitution• Damages



Powers of the Commission under Reg. No 1

- Interim measures (Art 8)
 - Not used under Reg. 1 – preferably to be handled by national courts (not treated further here)
- Cease-and-desist orders (Art 7)
 - Behavioural remedies
 - Structural remedies(Art 7(1))
- Commitments (Art 9)
- Fines (Art 23)
- “Finding of inapplicability” (Art 10)
 - Not used under Reg. 1 (not treated further here)



Article 7

- Order termination of infringement
 - Actual infringement or future continued infringement
- Distinction: Positive vs. negative orders
 - Terminating an infringement = to cease a certain conduct
 - Terminating an agreement/deleting a clause
 - Change course of conduct to bring it in line with Art. 102
 - Imposing positive duties
 - Only where a refusal to act constitutes an infringement (e.g. refusals to deal)
 - Information duties to give effect
- Structural remedies
 - Not likely because of proportionality principle



Limitations to Article 7

- Undertakings are free to choose how to comply
 - Case T-24/90 Automec II
- Requirement of proportionality
 - Remedy linked to the infringement
- Structural remedies
 - Difficult to see how they may ever be proportional in order to terminate an infringement
- Restoring compliance vs restoring competition
 - Case C-119/97 P
- Restoring trading conditions (lingering effects)



The commitment-mechanism in brief

- Regulation No 1 Art 9:
 - If the undertakings offer commitments which meet the concerns expressed by the Commission, the Commission may make these binding upon the undertakings
 - No finding of infringement or admission of guilt
 - No detailed procedure, and no right to obtain acceptance
 - Market testing
 - Not applicable if the Commission "intends" to impose a fine
- Purpose: To terminate infringements, but also to provide for flexible solutions to the "concerns" expressed by the Commission
- Inspired by US "consent decree"



Developments

- Two forms of decisions form a pattern:
 - Cartel- and abuse cases involving high fines
 - Commitment decisions under Regulation 1 Art 9
- Article 9 has paved the way for tailor-made remedies
 - Commission WP on Regulation 1/2003: "Article 9 adds considerable value in comparison to Regulation 17, under which no enforcement possibility was available for cases concluded by informal commitments"
- Bargaining power and unclear competence
 - A fine line between "use" and "abuse"



The use of commitments

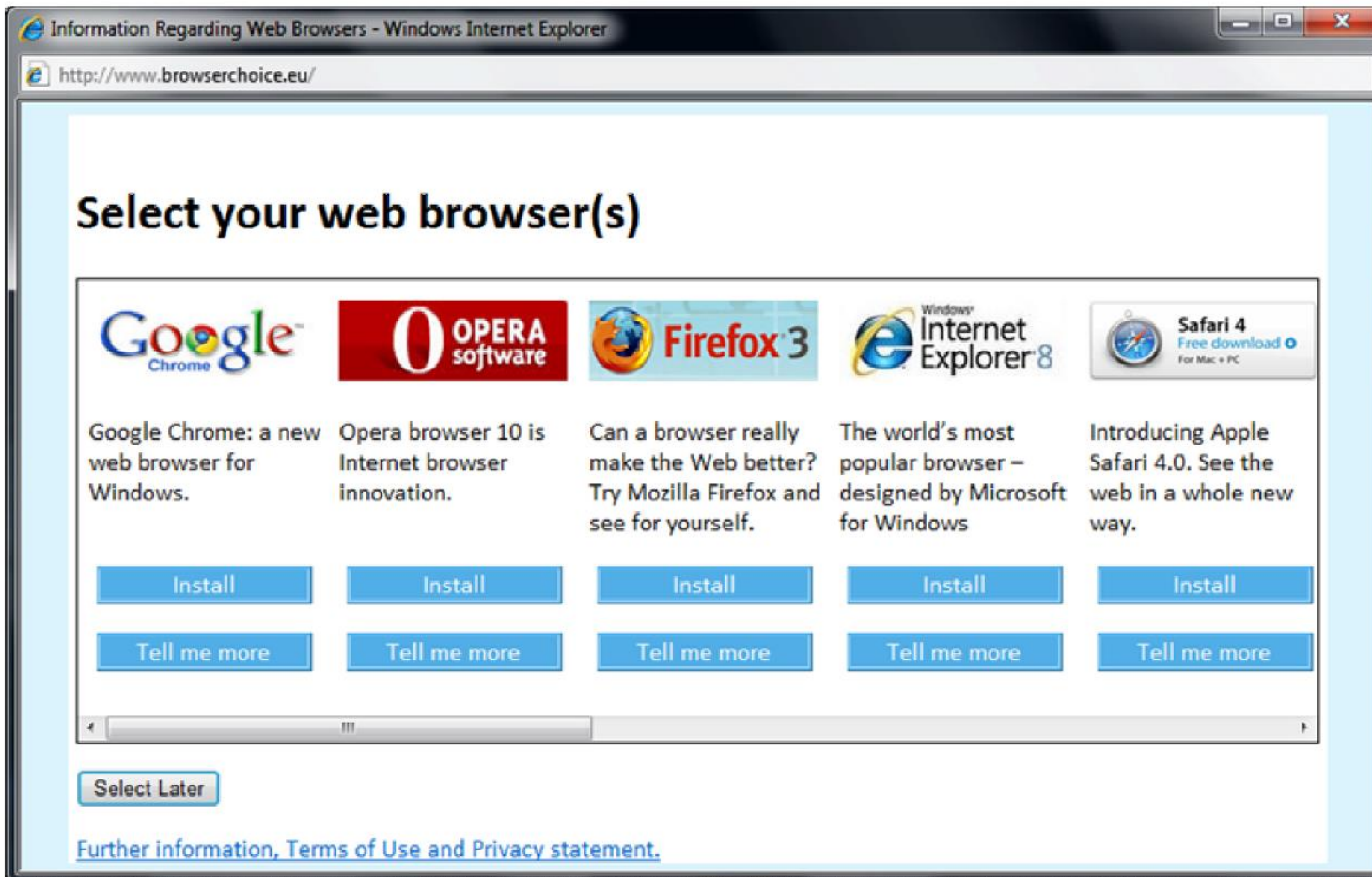
- Increased use after entry into force of Regulation 1
 - 2005: 2 dec.; 2006: 4 dec.; 2007: 2 dec.; 2008: 2 dec.; 2009: 5 dec.; 2010: 6 dec.; 2011: 2 dec.; 2012: 4 dec.; 2013: Star Alliance, Google
- Key points:
 - Equally distributed between Art 101 and 102, but clear trend towards Art 102 cases involving issues of market access
 - Commitments involving concrete and positive obligations to act in a specified manner
 - Obligations designed to facilitate entry or expansion
 - Art. 101: Premier League (38173) and Bundesliga (37214)
 - Art. 102: Most of the energy market cases
 - Several structural settlements



Efficiency of commitments

- Tailormade remedies without full adversarial procedure
- Remedies not available under Art. 7
- Procedural savings
- The Microsoft example
 - Tying of Windows and MS Explorer
 - Microsoft 1: Obligated to provide Windows without Media Player – hardly sold at all
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The solution



The screenshot shows a web browser window titled "Information Regarding Web Browsers - Windows Internet Explorer". The address bar displays "http://www.browserchoice.eu/". The main content area features the heading "Select your web browser(s)" and a grid of five browser options, each with a logo, a brief description, and two buttons: "Install" and "Tell me more".

Browser	Description	Buttons
Google Chrome	Google Chrome: a new web browser for Windows.	Install, Tell me more
Opera software	Opera browser 10 is Internet browser innovation.	Install, Tell me more
Firefox 3	Can a browser really make the Web better? Try Mozilla Firefox and see for yourself.	Install, Tell me more
Windows Internet Explorer 8	The world's most popular browser – designed by Microsoft for Windows	Install, Tell me more
Safari 4	Introducing Apple Safari 4.0. See the web in a whole new way.	Install, Tell me more

At the bottom left of the page, there is a "Select Later" button and a link for "Further information, Terms of Use and Privacy statement."

Browser order presented randomly



Efficiency of commitments

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- Procedural savings
- The Microsoft example
 - Tying of Windows and MS Explorer
 - Microsoft 1: Obligated to provide Windows without Media Player – hardly sold at all
 - Microsoft 2: Browser choice screen – could not have been imposed unilaterally
 - (Microsoft fined for non-compliance in 2013)



The Alrosa-case

- Alleged exclusive agreement between Russian exporter of raw-diamonds and DeBeers.
- Both undertakings initially under investigation
- DeBeers committed not to trade diamonds with Alrosa
- Alrosa brought the decision before the Courts
 - Decision quashed by the general Court (T-170/06), upheld on appeal by the ECJ (C-441/07)
 - Important statements on purpose and the proportionality principle
- Few other cases before the Courts
 - Case T-45/08 Molina (rights of contract party limited - dismissed)
 - T-148 & 149/10 (third party claiming commitment to be insufficient – withdrawn July 2013)



The Article 9-competence

- Art. 9 goes further than Art. 7
- Art. 7:
 - May only impose termination, and may not dictate how undertakings are to comply in the future
 - May not impose structural changes in order to prevent future infringements
- Art.9:
 - More limited proportionality test:
 - The undertakings proposing the commitment – proportional per se
 - Third parties – “ordinary” proportionality test, but limited to manifest errors
- Key difference: May accept the remedy proposed by the undertaking even though it could not have been imposed unilaterally



Implications for competition law enforcement

- Balancing
 - More efficient enforcement
 - Less time-consuming procedure
 - More suitable and specific remedies

Weighted against

 - Loss of deterrent effect
 - Lessened clarification of the law
 - Loss of compensation
- Article 9 & the rule of law
 - Remedies "beyond legal powers", and beyond the scope of the Treaty?
 - Beyond judicial review? (So far only third parties have challenged the decisions)
 - Creating "artificial" safe harbours?



The link between infringement and remedy

- No need for a finding of infringement
 - Several cases weakly founded in Art 101/102
- Primary focus of Art. 9: the commitment and the Commission's "concerns"
 - Art. 9 more flexible than Art. 7 wrt. future behaviour
- The combination of the two fosters an "inherent regulatory element" in commitment decisions
 - Incentives for judicial review?
- Undertakings are willing to accept wide-ranging obligations
 - Commission's "bargaining position" strengthened due to level of fines? (1,06 Bill.€ in the Intel-case)
- Deluting the link between infringement and remedy?



Fines – a powerful deterrent

- Fines up to 10 % of annual turnover
- All time high:
 - Intel € 1 060 000 000 (Abuse of dominant position)
 - Saint Gobain € 896 Million (Cartel – Car glass)
- Gravity x duration
 - Type of infringement
 - Retaliatory measures
 - Impact on market
 - Value of goods
 - Cooperation?
- Details: Guidelines on the method of setting fines 2006



Leniency (2006-notice)

- No fine imposed on first undertaking to provide evidence
 - Reduction of fines for second, third etc.
- Most "modern" cartel cases initiated by leniency applications
 - Why & how?
 - Cartels unstable
 - Prisoners' dilemma
- Settlement procedure in cartel cases introduced 2008 – increased importance
 - Waiving procedural rights
 - Admitting infringement
 - 10 % reduction of fine



Investigation / fact-finding

- Requests for information (Art 18)
- Power to take statements (Art 19)
- Powers of inspection (Art 20)
 - Dawn-raids ("razzias")
 - Undertakings required to submit to decisions on inspections
 - Decision to specify subject-matter (20.4)
 - Role of national courts (20.8)
- Inspection of private homes (Art 21)
 - "Reasonable suspicion"
- Investigations by NCA's (Art 22)
- Also: Sector Inquiries (Art. 17)



Rights of the defence I

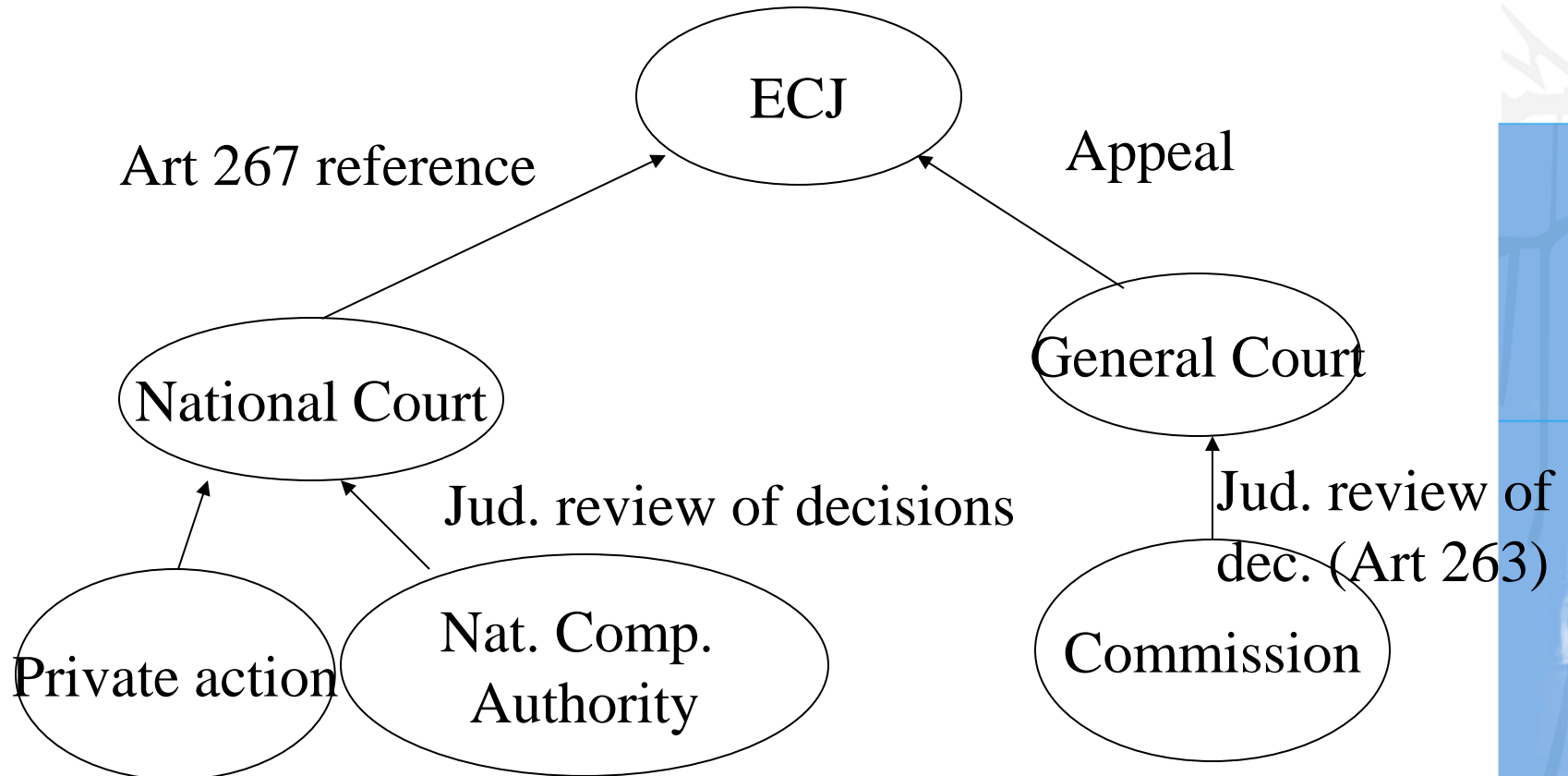
- Self-incrimination – A right to remain silent?
 - ECHR not directly applicable in EU law, but Charter on fundamental rights + EU will accede to the Convention (TEU Article 6)
 - The Orkem principle:
 - ”the Commission may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove”
- Client-lawyer privilege
 - Correspondence with external lawyer relevant for the case



Rights of the defence II

- The right to be heard (1/03 Chpt. VIII & 773/04 Chpt. V)
 - Statement of objections
 - Hearings
- Access to file (773/04 A. 15)
- Secrecy/Use of information (1/03 A. 28)
- Ongoing discussion about EU Competition Law and ECHR
 - The Commission: Investigator – prosecutor – and judge(!)?
 - ECHR in recent judgment *A. Menarini Diagnostics S.R.L. v. Italy* (no. 43509/08) (27 September 2011) ruled that the similar system in Italy was not contrary to Art. 6 ECHR

Judicial review and enforcement



Co-operation between Commission, NCA and NC



Judicial review of Commission decisions – Article 263 TFEU

- A challengeable act
- Locus standi
 - Plaumann-test: Directly and individually concerned
- Grounds of review
 - Lack of competence
 - Infringements of procedural requirements
 - Infringement of the Treaty
 - Misuse of powers (détournement de pouvoir)
- Fines: Unlimited jurisdiction (Reg 1 Art 31)



Private enforcement

- Art 101 and 102 are directly applicable, and may be applied by National Courts
- Private action not subject to specific regulation, but
 - Power to apply 101&102 mentioned in the Regulation (Art 6)
 - Cooperation Commission/national courts (Art 15)
- General principles of EU law apply, together with relevant national law
 - Nullity: Article 101(2)
 - Damages: Case C-453/99 *Courage*, C-295/04 *Manfredi*: Damages required by EU law
 - Cf. *Francovich* (State liability)
 - Injunctions



Private enforcement

- Several Commission initiatives to boost private enforcement
 - <http://ec.europa.eu/competition/antitrust/actionsdamages/index.html>
 - Green Paper 2005
 - White Paper 2008
 - Collective redress – consultation 2011
 - Draft notice on calculation of damages 2011
 - Directive on private enforcement 2014
- US: Well developed system of private enforcement
 - Treble damages
- Not likely to see US style private enforcement in the EU
 - Culture
 - Procedural devices
 - But may contribute as a supplement to public enforcement



Private enforcement

- Particular issues:
 - Principle of effective remedies vs. effective enforcement of competition law: C-360/09 Pfleiderer
 - The impact of commitment decisions
 - Calculation of damages
 - Passing on the monopoly overcharge
 - As a plaintiff
 - As a defendant