



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
 - EC 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 EC law where interstate 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

Function \ Type	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



Article 9 commitments in brief

- **Function:**
 - The Commission may make commitments resolving competition concerns binding on undertakings
 - Not applicable if a fine is to be imposed
 - No acceptance of guilt or finding an infringement
- **Procedure**
 - Few procedural rules
 - Market testing
- **Competence**
 - Any remedy which would resolve the problem
 - Simplified proportionality test
 - Case C-441/07 Alrosa (29 June 2010)
- **Sanctions**
 - Fines, Art. 23(2)



The use of commitments

- Increased use after entry into force of Regulation 1
 - 2005: 2 decisions, 2006: 4 decisions, 2007: 2 decisions, 2008: 2 decisions, 2009: 5 decisions, 2010: 6 decisions, 2011: 2 decisions, 2012: 1 decision
- Equally distributed between Art 101 and 102, but clear trend towards Art 102 cases involving issues of market access
- Several structural settlements
- Key points:
 - Commitments involving concrete and positive obligations to act in a specified manner
 - Obligations designed to facilitate entry or expansion

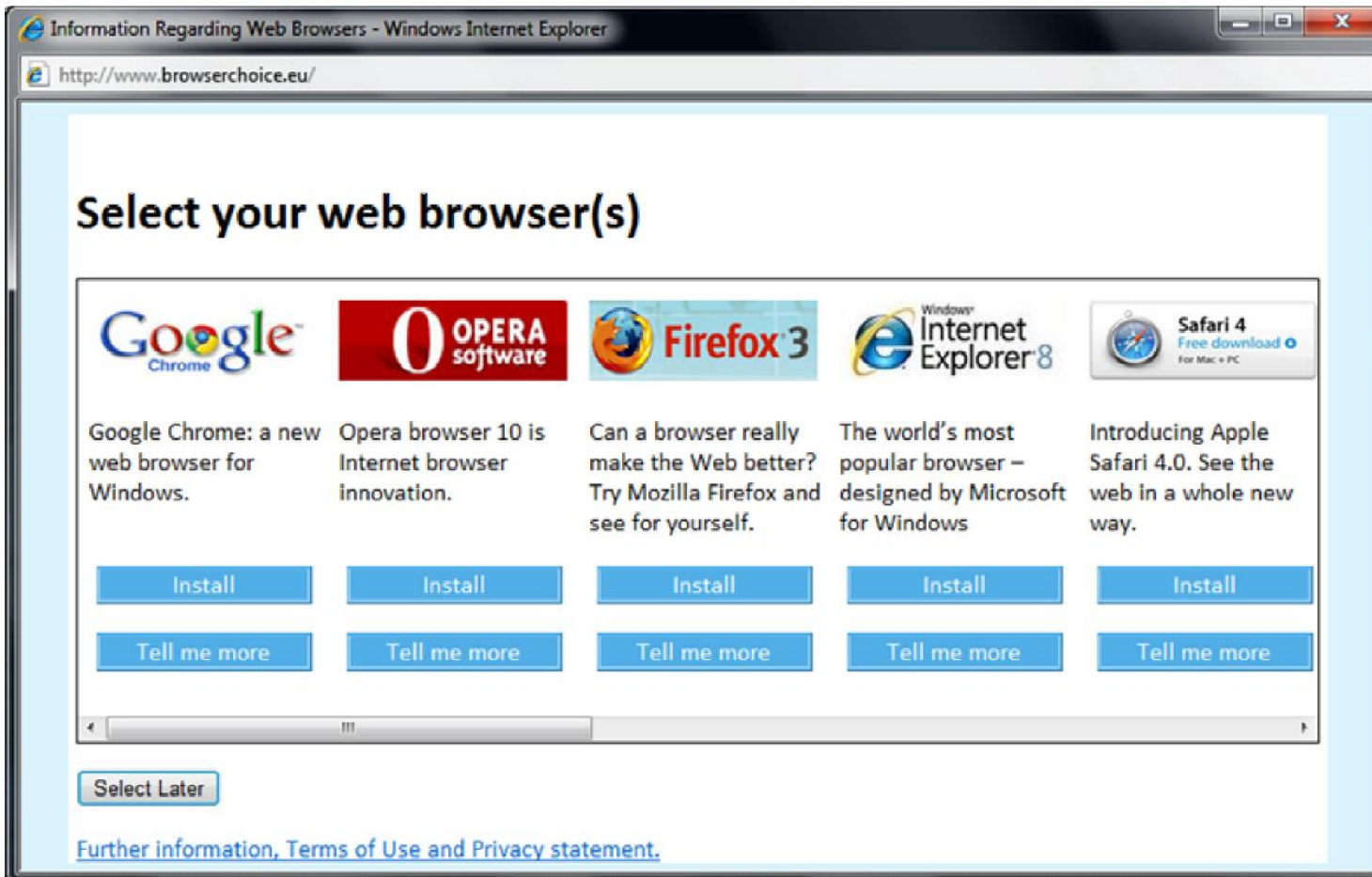


Efficiency of commitments

- Tailormade remedies without full adversarial procedure
- Remedies not available under Art. 7
- Procedural savings

- The Microsoft example
 - Tying of Windows and MS Explorer
 - Complaint from i.a. Norwegian company Opera
 - Statement of Objections 15 January 2009
 - Microsoft's proposed commitments market tested October 2009
 - Commitment decision 17 December 2009
 - Could arguably not have been imposed unilaterally by the Commission under Article 7

The solution



The screenshot shows a web browser window titled "Information Regarding Web Browsers - Windows Internet Explorer" with the address bar displaying "http://www.browserchoice.eu/". The main content area is titled "Select your web browser(s)" and features five browser options arranged horizontally. Each option includes a logo, a brief description, and two buttons: "Install" and "Tell me more". The browsers shown are Google Chrome, Opera software, Firefox 3, Windows Internet Explorer 8, and Safari 4. Below the main content area, there is a "Select Later" button and a link for "Further information, Terms of Use and Privacy statement." The browser window also shows standard Windows XP window controls (minimize, maximize, close) and a scrollbar.

Browser
order
presented
randomly



Fines – a powerful deterrent

- Fines up to 10 % of annual turnover
- All time high:
 - Microsoft Corp.: € 497 Million (Abuse of dominant position)
 - 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
 - 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

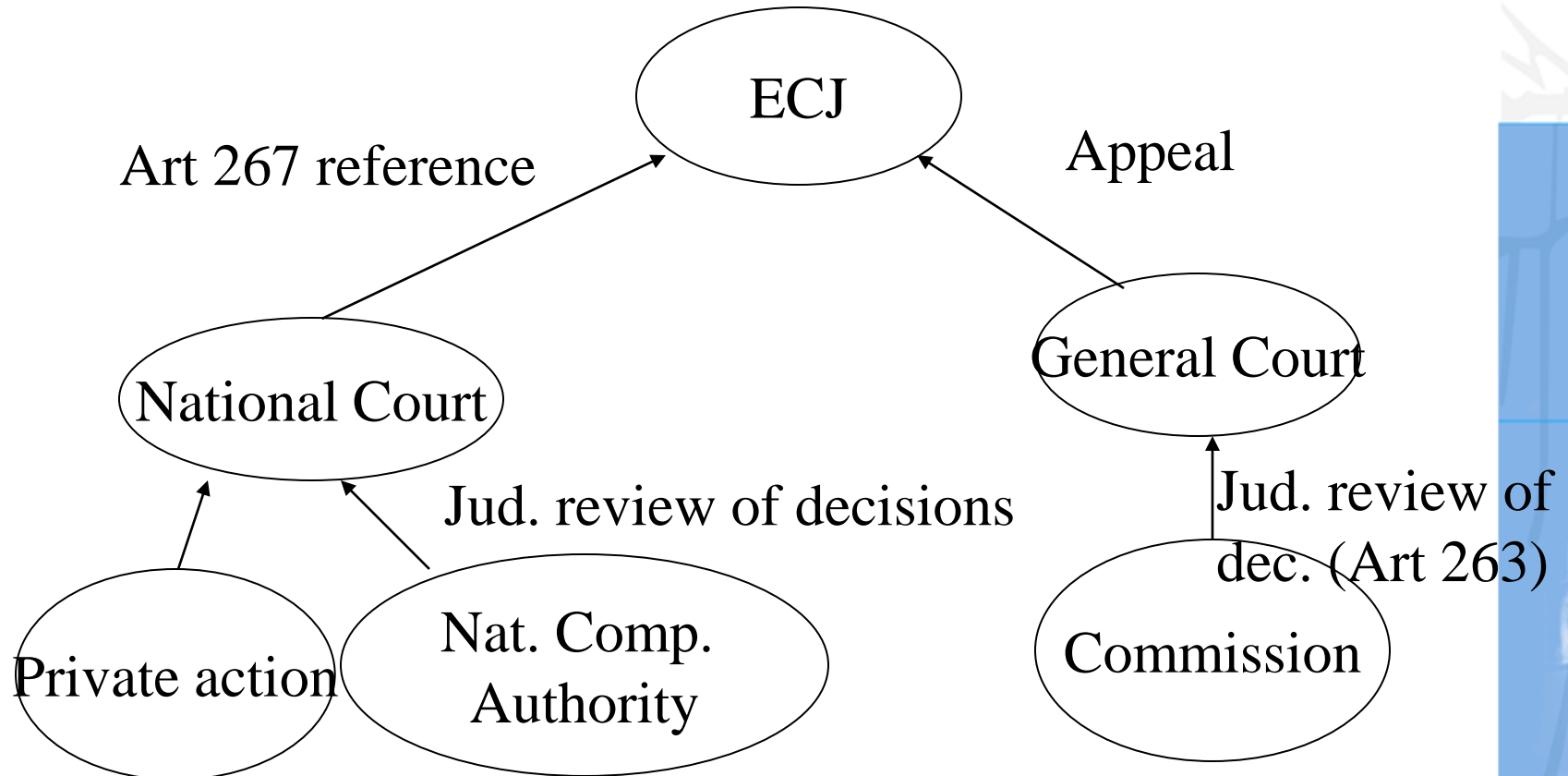
- Self-incrimination – A right to remain silent?
 - ECHR not directly applicable in EU law, but Charter on fundamental rights + EU will accede to the Convention (TEU Article 6)
 - The Orkem principle:
 - ”the Commission may not compel an undertaking to provide it with answers which might involve an admission 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)



A role for private enforcement?

- US: Treble damages
- 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



A role for 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
- Not likely to see US style private enforcement
 - Culture
 - Procedural devices
- But may contribute as a supplement to public enforcement