

# **EU and US Antitrust Arbitration**

# **EU and US Antitrust Arbitration**

A Handbook for Practitioners

Volume 1

Edited by

Gordon Blanke  
Phillip Landolt



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## Chapter 21

# Assistance by the European Commission and Member States Authorities in Arbitrations

by *Assimakis P. Komninou*

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## I. INTRODUCTION

**21-001 Explaining the question of assistance by competition authorities – the competition law angle.** The very idea of an arbitral tribunal seeking the assistance of or cooperation with a specialized antitrust authority is not obvious, especially for US lawyers, and requires some explanation. Indeed, it can be described as a typical ‘European’ question and can be explained because of the institutional position of courts in the overall system of EU competition law enforcement. Although the enforcement agencies in the US do file occasionally *amicus curiae* briefs in pending cases before the courts, ‘assistance’ from or ‘cooperation’ with or even ‘supervision’ by the Antitrust Division of the Department of Justice in the EU sense has never been an issue for US courts applying the antitrust laws.<sup>1</sup> On the contrary, in the EU, this has been an ever-existing concern. The reasons of this diversity lie in the profound development of the US system of private antitrust enforcement and in its long emancipation from the public enforcement model. They are also to be explained historically, because in the EU, the previous prior authorization system and the centralized enforcement at the level of the Commission<sup>2</sup> made natural such dependence of civil courts on the Commission and public authorities.

**21-002 The arbitration angle.** Also seen from an arbitration law angle, the question of the arbitrators’ cooperation with the European Commission or with other competition authorities is not free of controversy. Arbitrators, being private judges, merely resolve disputes that the parties have submitted to them and only to them. In addition, modern arbitration laws provide for the independence of the arbitration procedure of any state intervention, and there are only few well-circumscribed occasions of cooperation with and dependence on judicial organs<sup>3</sup> and certainly not on any administrative authorities.

1. See, e.g., B. Hawk, ‘The Role of the Judge – Working Paper II’, in *European Competition Law Annual 1996*, eds C.-D. Ehlermann & L. Laudati (The Hague/Boston/London, 1997), 337, according to whom, ‘to an American observer, and perhaps to many Member State judges, the notion of an administrative authority overseeing courts is bizarre if not ludicrous’; S.V. Vance, ‘Judicial Application of Article 81(3): Are the Fears Justified?’, in *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy*, eds C.-D. Ehlermann & I. Atanasiu (Oxford/Portland, 2001), 638, stressing that for US judges, it appears distasteful for a court to interrupt its proceedings in order to ask a public authority for an answer to complex economic questions; G. McCurdy, ‘The Impact of Modernisation of the EU Competition Law System on the Courts and Private Enforcement of the Competition Laws: A Comparative Perspective’, *European Competition Law Review* 25 (2004): 509, at 511.

2. See Ch. 12.

3. On the complementary roles of judges and arbitrators, see, e.g., G.R. Delaume, ‘L’arbitrage transnational et les tribunaux nationaux’, *JDI (Clunet)* 111 (1984): 521; B. Goldman, ‘The Complementary Roles of Judges and Arbitrators in Ensuing that International Commercial Arbitration is Effective’, in *International Arbitration, 60 Years of ICC Arbitration, A Look at the Future*, ICC Court of Arbitration (Paris, 1984); K.D. Kerameus, ‘The Examination of an Arbitration Agreement by State Courts while Arbitration Is Pending’, *RHDI* 42–43 (1989–1990): 217; F. Carpi, ‘Les rapports entre L’arbitrage et le juge ordinaire’, *Zeitschrift für Zivilprozess International: Jahrbuch des Internationalen Zivilprozessrechts* 2 (1997): 397; P. Sanders, *Quo Vadis Arbitration?, Sixty Years of Arbitration Practice, A Comparative Study* (The Hague/Boston/Dordrecht, 1999), 18 et seq.; M. Ball, ‘The Essential Judge: The Role of the Courts in a System of National and International Commercial Arbitration’, *Arb Int’l* 22 (2006): 73, at 74 et seq.

**Structure of this chapter.** In any event, the arbitrators' cooperation with the Commission and competition authorities is a real question, at least in Europe, with many theoretical and practical underpinnings. The present chapter will start with an analysis of the equivalent system of cooperation between the Commission<sup>4</sup> and national courts (section II), and then it will focus on the institutional position of arbitration in the system of EU competition law enforcement (section III). In particular, it will examine the extent to which the existing mechanisms of cooperation between the Commission and national courts are transposable to arbitration, and it will also address the question of informal cooperation between the two institutions (section IV). This chapter will close with some summary conclusions (section IV). **21-003**

## II. REGULATION 1/2003 AND COOPERATION MECHANISMS WITH COURTS

### A. GENERAL SPIRIT OF COOPERATION

**Institutional framework of EU competition law enforcement.** The basic premises of the system of EC competition law enforcement are to be found in Council Regulation 1/2003.<sup>5</sup> That Regulation not only lays down the mechanisms for public enforcement by the Commission but also deals with the decentralized application of the Treaty competition rules by national (competition) authorities and courts.<sup>6</sup> Specifically with regard to national courts, the Regulation does not stop at confirming their full competence to apply EU competition law but also creates an institutional framework, with prudential mechanisms that aim at meeting concerns regarding the consistency of decentralized enforcement of EU competition law. Chapter IV provisions under the title 'Cooperation with national authorities and courts' are permeated by a general spirit of cooperation. That spirit is further elaborated and given effect by the accompanying Notice on cooperation between the Commission and national courts. **21-004**

### B. THE COOPERATION BETWEEN THE COMMISSION AND NATIONAL COURTS

#### 1. The Right of Courts to Seek the Commission's Assistance

The first important means of cooperation, which was already at the disposal of national courts dealing with EU competition law issues under the previous system of enforcement but is codified and strengthened by Regulation 1/2003, is the possibility for national courts to seek the Commission's assistance. **21-005**

**The old framework.** Already long before modernization, the European Court of Justice had on numerous occasions stressed the Commission's duty to assist national courts in matters pertaining to EU law, a duty emanating from Article 10 of the EC Treaty [4(3) TEU].<sup>7</sup> Then in the area of competition law, the Commission published in **21-006**

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4. This chapter will mainly focus on the cooperation of arbitrators with the European Commission and not so much with other (national) competition authorities, unless special attention to the cooperation with the latter is called for.
  5. Council Regulation 1/2003 of 16 Dec. 2002 on the Implementation of the Rules on Competition Laid down in Arts 81 and 82 of the Treaty, OJ 2003 L1/1.
  6. See Ch. 12.
  7. See Case C-2/88, *Criminal Proceedings against J.J. Zwartveld et al.* [1990] ECR I-3365, paras 17–18; Case C-234/89, *Stergios Delimitis v. Henninger Bräu AG* [1991] ECR I-935, para. 53.

1993 a Cooperation Notice,<sup>8</sup> which contained detailed provisions on this mechanism, but national courts made little use of the procedures enshrined therein.<sup>9</sup> This may have been due either to national procedural obstacles or to the courts' general reluctance to take that course because of the perceived limited scope of the information that the Commission could give them under the Notice or, perhaps most likely, to the belief of a national judge that if a delay in the national litigation is necessary to consult an 'outside' body, it is better to consult the Court of Justice on the question, through the formalized preliminary reference mechanism of Article 234 EC [267 TFEU], rather than the Commission.

**21-007 Article 15(1) of Regulation 1/2003.** Notwithstanding the mechanisms in place before modernization, Regulation 1/2003 put everything in a different perspective. There were now provisions in a hard-law instrument about the rights of national courts to seek (and get) the Commission's assistance. Thus, the express provision of Article 15(1) of the Regulation establishes a right for national courts to obtain legal or economic information from the Commission or request its opinion on questions relating to the application of the competition rules.<sup>10</sup>

**21-008 The Cooperation Notice.** This hard law duty is further elaborated in a new Cooperation Notice,<sup>11</sup> which develops the details of this procedure and also provides for deadlines by which the Commission must reply.<sup>12</sup>

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Article 4(3) TEU provides: 'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.'

8. Commission Notice on Cooperation between National Courts and the Commission in Applying Arts 85 and 86 of the EEC Treaty, OJ 1993 C39/6.
9. Up to 1998 national courts had seized the Commission in fifteen cases. These applications for assistance came from Belgium (three cases), France (three cases), Germany (three cases), the Netherlands (one case), Spain (three cases), the UK (one case), and, interestingly, one arbitral tribunal having its seat in Spain. The time taken by the Commission to respond varied from some months in most cases to two years in one case. See further V. Joris, 'Communication relative à la coopération entre la Commission et les juridictions nationales pour l'application des articles 85 et 86: Cas d'application jusqu'à présent', *EC Competition Policy Newsletter* (1998-1), 47, at 47–48. In 1999, national courts used the 1993 Notice on cooperation in order to seek the assistance of the Commission in only five cases (see Commission XXIXth Report on Competition Policy – 1999 (Brussels, 2000), 363 et seq.). In 2000, national courts applied to the Commission in seven cases (see Commission XXXth Report on Competition Policy – 2000 (Brussels, 2001), 338 et seq.).
10. Article 15(1) Reg. 1/2003 provides: 'In proceedings for the application of Article 81 or Article 82 of the Treaty [101 or 102 TFEU], courts of the Member States may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of the Community [now Union] competition rules'.
11. Commission Notice on Cooperation between the Commission and the Courts of the EU Member States in the Application of Arts 81 and 82 EC, OJ 2004 C101/54. The Notice makes part of the so-called 'Modernisation Package', which consists of six Commission Notices that accompany Regulation 1/2003 and apply as of 1 May 2004. Since Regulation 1/2003 itself could not establish the details of how the new modernized and decentralized enforcement system would operate, the notices were intended to fill this gap and offer national authorities and courts assistance in their new role as EU competition law enforcers.
12. Cooperation Notice, *supra* n. 11, paras 21–30.

Thus, a national court may request two kinds of assistance from the Commission:

- It may ask for documents in the Commission’s possession, or for information of a procedural nature, basically concerning the status of the proceedings before the Commission. The Notice promises that the Commission will respond to such requests within in a month.<sup>13</sup>
- Alternatively, the court may ask the Commission for its opinion on economic, factual, and legal matters. The Commission will aim to do so within four months.<sup>14</sup> The Cooperation Notice appears to grant this second possibility only if other tools (the case law of the EU courts and Commission regulations, decisions, notices, and guidelines) ‘do not offer sufficient guidance’.<sup>15</sup>

**Questions of due process.** National courts remain free to decide whether or not to seize the Commission under the terms of Article 15(1) and are not bound by the opinions or assistance given by the Commission in this context.<sup>16</sup> Nevertheless, the cooperation procedure has raised concerns regarding due process, since the Commission’s opinion will be transmitted without the parties being heard,<sup>17</sup> and the court might follow it slavishly without giving the parties an effective opportunity to contradict it. As the rules stand, the Commission will not be under an obligation to communicate its submissions to the parties or to base them on the evidence before the court.<sup>18</sup> 21-009

This may contrast with the equivalent status of communications to national courts by national competition authorities. Thus in French law, any communication by the *Autorité de la concurrence* pursuant to a court request that concerns national or EU competition law questions presupposes that the parties are heard (*procédure contradictoire*), unless the information transmitted has its source in past proceedings before the *Autorité*.<sup>19</sup>

A related issue is whether the Commission may request the national court to provide it with certain information based on the dossier of the case, in order for the former to give an informed opinion. To accede to the Commission’s request would, of course, be entirely up to the national court, but there may be questions of due process, if the Commission were to rely upon this information to open infringement proceedings.<sup>20</sup>

**Treatment of professional and business secrets.** The cooperation procedure between the Commission and national courts also raises some important questions regarding the types 21-010

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13. *Ibid.*, para. 22.

14. *Ibid.*, para. 28. This may not be satisfactory, especially in cases of urgency such as preliminary injunction proceedings.

15. *Ibid.*, para. 27. This limitation, however, is not in line with the Court of Justice’s case law on cooperation between national courts and the Commission. According to the principles emanating from Art. 10 EC [4(3) TEU], the time and circumstances of a national court’s request for the Commission’s assistance are entirely subject to the national court’s discretion. In any event, this limitation appears to be really more of a reminder to national courts to ensure the effectiveness of this mechanism by using it prudently and not to overwhelm the Commission with requests for assistance.

16. *Ibid.*, paras 19 and 29.

17. *Ibid.*, paras 19 and 30.

18. See in this respect the critical comments by H.M. Gilliams, ‘Modernisation: From Policy to Practice’, *European Law Review* 28 (2003): 451, at 462.

19. Article L462-3 *Code de commerce*.

20. See, however, Case C-60/92, *Otto BV v. Postbank NV* [1993] ECR I-5683, para. 20, which seems to exclude such risk.

of information that the Commission can transmit to national courts. One issue is protection of professional and business secrets.

The Cooperation Notice attempts to reconcile the various conflicting interests by leaving it up to national courts whether to request information covered by professional secrecy. However, it provides for some safeguards: in particular, before transmitting such information, the Commission must ask the national court whether it can offer a guarantee that it will protect confidential information and business secrets. The Commission has opted for this specific kind of ‘dialogue’ with the national courts based on a combined reading of Articles 10 and 287 EC [4(3) TEU and 339 TFEU].<sup>21</sup> This is in line with the *Otto BV v. Postbank NV* ruling of the Court of First Instance.<sup>22</sup>

**21-011 Exceptions to cooperation.** The Commission may exceptionally refuse to transmit any kind of information to national courts, in order to ‘safeguard the interests of the Community [now Union] or to avoid any interference with its functioning and independence, in particular by jeopardizing the accomplishment of the tasks entrusted to it’.<sup>23</sup> This is intended to include correspondence between the Commission and national competition authorities in the framework of the European Competition Network.<sup>24</sup>

**21-012 Disclosure of information and leniency.** Whether litigants may request the Commission, through the national court, to disclose written statements and descriptions given by companies under the Leniency Notice,<sup>25</sup> is crucially important. The Commission declares in the Cooperation Notice that it will only disclose such information to national courts with the leniency applicant’s consent,<sup>26</sup> as such disclosure would otherwise prejudice the Commission’s effective enforcement of EU competition law. While public enforcement by the Commission and the facilitating of detection through immunity from fines should

21. Cooperation Notice, *supra* n. 11, paras 23–25. Art. 287 EC [339 TFEU] provides: ‘The members of the institutions of the Union, the members of committees, and the officials and other servants of the Union shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components’.

22. Case T-353/94 R, *Postbank NV v. Commission* [1996] ECR II-921, para. 69: ‘Once such documents from the administrative procedure are produced in national legal proceedings, there is a presumption that the national courts will guarantee the protection of confidential information, in particular business secrets, since, in order to ensure the full effectiveness of the provisions of Community [now Union] law in accordance with the principle of cooperation laid down in Article 4(3) TEU, these authorities are required to uphold the rights which those provisions confer on individuals’.

23. Cooperation Notice, *supra* n. 11, para. 26.

24. Since 2004, national competition authorities and the Commission make up the European Competition Network (ECN), which provides for specific duties of cooperation and consultation in the enforcement of EU competition law. The ECN’s main objective is to ensure an efficient work sharing between the public enforcers and to promote a coherent application of the EC competition rules.

25. Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, OJ 2006 C298/17.

26. Cooperation Notice, *supra* n. 11, para. 26. See also paras 32–33 of the Leniency Notice, *supra* n. 25: ‘The Commission considers that normally disclosure, at any time, of documents received in the context of this notice would undermine the protection of the purpose of inspections and investigations within the meaning of Article 4(2) of Regulation (EC) no. 1049/2001 of the European Parliament and of the Council’.

not operate to the detriment of private enforcement and the compensation of cartel victims, there are, nevertheless, less onerous ways to pursue these objectives than by disclosing the documents that companies have submitted to the Commission under the Leniency Notice, which would frustrate the aim of making detection of hardcore restrictions of competition easier by discouraging companies from taking advantage of it. Private litigants therefore have to rely solely on discovery in the context of the civil proceedings or content themselves with non-leniency-related evidence held by the Commission.<sup>27</sup>

**Experience so far.** The experience so far of the application of Article 15(1) of the Regulation in practice is positive. Within five years (May 2004 to April 2009), the Commission has issued opinions to national courts on eighteen occasions.<sup>28</sup> However, national courts are still reluctant to contact the Commission and seek its assistance or an opinion. Perhaps this reluctance is due to the fact that some courts believe that the Commission, being an administrative agency with its own policy priorities, may be an inappropriate interlocutor and prefer thus to seize the Court of Justice through Article 234 EC [267 TFEU]. **21-013**

## 2. The Duty to Transmit Copies of National Judgments to the Commission

**Article 15(2) of Regulation 1/2003.** Regulation 1/2003 provides for some other procedures and duties of cooperation. Article 15(2) imposes on Member States the duty to forward copies of their national courts' judgments to the Commission.<sup>29</sup> The main aim of this provision is to make the Commission aware of judgments that may put in question the consistent application of EC competition law. A more specific aim is to offer the Commission the possibility to intervene at a subsequent stage in the litigation, as *amicus curiae* further to Article 15(3) of the Regulation. Member States only have to forward copies of *judgments* to the Commission, in particular, judgments where Articles 81 and 82 EC [101 and 102 TFEU] are *applied* and not just *invoked*. This essentially means that the Commission will have no other way of learning about such proceedings before judgment is reached and must rely on being informed by litigants.<sup>30</sup> **21-014**

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27. The 2008 Commission White Paper on damages actions also proposes to introduce protective measures against discoverability of corporate statements made or submitted by leniency applicants, regardless of whether the application for leniency is accepted, is rejected, or does not lead to any decision. See Commission White Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2008) 165 final, s. 2.9; Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules, SEC(2008) 404, paras 295–298. See further Ch. 12.

28. Five opinions were issued to Belgian courts, nine opinions to Spanish courts, one opinion to a Lithuanian court, one opinion to a Dutch court, and two opinions to Swedish courts. See further Commission Staff Working Paper Accompanying the Communication from the Commission to the European Parliament and Council on the Report on the Functioning of Regulation 1/2003, SEC(2009) 574 final, paras 277–282. The text of some of these opinions is published by the Commission in <<http://ec.europa.eu/competition/court/requests.html>>.

29. Article 15(2) Reg. 1/2003 provides: 'Member States shall forward to the Commission a copy of any written judgment of national courts deciding on the application of Article 81 or Article 82 of the Treaty [101 and 102 TFEU]. Such copy shall be forwarded without delay after the full written judgment is notified to the parties'.

30. See E. Paulis & C. Gauer, 'La réforme des règles d'application des articles 81 et 82 du Traité', *JdT* (Eur.) 11 (2003): 65 at 73; A. Frignani, 'La messa in opera delle nuove norme antitrust

**21-015 Experience so far.** The experience so far is rather disappointing. Only a fraction of national judgments is forwarded to the Commission, and there are Member States, such as Italy or Greece, which systematically do not forward any judgments where EU competition law has been applied.<sup>31</sup>

### 3. The Amicus Curiae Mechanism

**21-016 Article 15(3) of Regulation 1/2003.** A further new cooperation mechanism, introduced for the first time in Article 15(3) of the Regulation, is the power of the Commission and national competition authorities to file amicus curiae briefs in national proceedings.<sup>32</sup> This is intended to be used mainly as a precautionary mechanism drawing the court's attention to difficult competition issues that require a high degree of consistent application throughout the EU. In this sense, such amicus curiae briefs complement the preliminary reference procedure of Article 234 EC [267 TFEU].<sup>33</sup>

**21-017 Due process concerns.** The Commission and national competition authorities are not intended to be parties to the proceedings but rather to act as objective, neutral, and independent economic experts. However, their role has raised some due process concerns, mainly from the private practice side.<sup>34</sup> Thus, it is feared that some judges might follow the Commission's statements in a copy-paste manner, without giving the parties the opportunity to contradict them effectively. In addition, although Article 15(3) of Regulation 1/2003 restricts such intervention by the Commission solely to cases where 'the coherent application of Article 81 or 82 of the Treaty [101 or 102 TFEU] so requires', and the

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comunitarie (il Regolamento 1/2003 e suoi riflessi nel diritto italiano)', *Il Diritto Industriale* (2004), 457, at 468. This is now the formalized practice in England where any party whose statement of case raises or deals with an issue relating to the application of Arts 81 and 82 EC [101 and 102 TFEU] or the equivalent national provisions must serve a copy of the statement of case on the OFT at the same time as it is served on the other parties to the claim. See Practice Direction – Competition Law – Claims Relating to the Application of Arts 81 and 82 of the EC Treaty and Chapters I and II of Part I of the Competition Act 1998, para. 3. The same duty of notification is imposed on appellants. See Practice Direction 52 – Appeals, para. 21.10A. See M. Gray, M. Lester et al., *EU Competition Law: Procedures and Remedies* (Richmond, 2006), 251.

31. According to the Commission Report on the functioning of Reg. 1/2003 (*supra* n. 28, para. 291), approximately 175 national judgments have been transmitted to the Commission, while twelve Member States have not sent any judgments. The database of judgments transmitted by the Member States is currently complemented by a compilation of judgments handed down by national courts from 2006 onwards, which is prepared by most national competition authorities for their respective jurisdictions and is made available on the Commission's website at <http://ec.europa.eu/competition/elojade/antitrust/nationalcourts>.

32. Article 15(3) Reg. 1/2003 provides: 'Competition authorities of the Member States, acting on their own initiative, may submit written observations to the national courts of their Member State on issues relating to the application of Article 81 or Article 82 of the Treaty [101 or 102 TFEU]. With the permission of the court in question, they may also submit oral observations to the national courts of their Member State. Where the coherent application of Article 81 or Article 82 of the Treaty [101 or 102 TFEU] so requires, the Commission, acting on its own initiative, may submit written observations to courts of the Member States. With the permission of the court in question, it may also make oral observations'.

33. Of course, the Commission's opinion, unlike judgments of the Court of Justice, cannot bind a national court.

34. See, e.g., J.-F. Bellis, 'Les défis de la modernisation du droit européen de la concurrence', *JdT* (Eur.) 11 (2003): 73, at 74.

Cooperation Notice states that the Commission will be guided in its submissions only by its duty to defend the public interest and not by any private interests involved, it will not always be easy for the Commission to avoid taking sides. Moreover, the water-tight distinction between the public and the private interest in competition cases of which the Commission is so fond of is largely a fiction. It is therefore difficult, despite the Commission's eagerness to stress in the Cooperation Notice its detachment from the actual litigation,<sup>35</sup> to see how it could avoid being cross-examined by one or other of the parties, especially when the national court gives them this opportunity.<sup>36</sup>

**Conditions.** The conditions for the submission of observations by the Commission and by national competition authorities differ. National competition authorities are the preferred *amici curiae* and may submit their observations on any issue 'relating to the application of Article 81 or Article 82 of the Treaty [101 or 102 TFEU]'.<sup>37</sup> The Commission, on the other hand, may submit such observations only exceptionally, if 'the coherent application of Article 81 or Article 82 of the Treaty [101 or 102 TFEU] so requires'.<sup>38</sup> The Commission and national competition authorities have the power to submit written observations on their own initiative, but their making of oral observations is subject to the national court's permission.<sup>39</sup> **21-018**

**Transmission of documents by courts.** To enable the Commission and national competition authorities to make use of the *amicus curiae* system, Article 15(3)(b) of Regulation 1/2003 imposes a duty on national courts to transmit to the Commission any documents necessary for the assessment of the case. This constitutes the only direct duty placed on the courts in the context of cooperation under Article 15 of the new Regulation, and it is a duty of an 'administrative' or 'clerical' nature that will be discharged via the courts' registries.<sup>40</sup> It must be seen in conjunction with the Article 15(2) duty of Member States to transmit copies of judgments to the Commission. The two provisions are intended to work in a complementary fashion: in other words, the Commission will only use Article 15(3)(b) to request the documents of a case on which it has received a first instance national judgment. This means that in the majority of cases, the Commission will intervene only at the stage of appeal, after being alerted accordingly through the mechanisms of paragraphs (2) and (3)(b) of Article 15 of the new Regulation. **21-019**

**Experience so far.** The Commission has intervened as *amicus curiae* so far only in two national proceedings.<sup>41</sup> One was a French civil proceeding concerning the interpretation of the concept of quantitative selective distribution in the Motor Vehicle Block Exemption Regulation<sup>42</sup> and the other a Dutch proceeding that concerned the tax deductibility of **21-020**

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35. Cooperation Notice, *supra* n. 11, paras 19 and 29.

36. This is a very sensitive issue, which may eventually have to be resolved by the Court of Justice through a preliminary reference by a national court before which the Commission has exercised its power of *amicus curiae* intervention.

37. Article 15(3)(a) Reg. 1/2003.

38. *Ibid.*

39. Of course, national procedural law may grant wider powers to national competition authorities in this context. This is not prohibited or excluded by Reg. 1/2003.

40. Cooperation Notice, *supra* n. 11, para. 33.

41. See Commission Report on the functioning of Reg. 1/2003, *supra* n. 28, paras 283–290.

42. Commission Regulation 1400/2002 of 31 Jul. 2002 on the Application of Art. 81(3) of the Treaty to Categories of Vertical Agreements and Concerted Practices in the Motor Vehicle Sector, OJ 2002 L203/30.

Commission competition fines. The latter case gave rise to a preliminary reference under Article 234 EC [267 TFEU] because the Dutch court entertained doubts as to the power of the Commission to intervene as *amicus curiae* on the basis of Article 15(3) of Regulation 1/2003. The national court, in particular, noted that the proceeding at issue was not one where Articles 81 and 82 EC [101 and 102 TFEU] were ‘applied’ but rather concerned a totally different issue, tax deductibility of fines. The Court of Justice, however, made clear that:

the option for the Commission, acting on its own initiative, to submit written observations to courts of the Member States is subject to the sole condition that the coherent application of Articles 81 EC or 82 EC [101 or 102 TFEU] so requires. That condition may be fulfilled even if the proceedings concerned do not pertain to issues relating to the application of Article 81 or Article 82 of the Treaty [101 or 102 TFEU].<sup>43</sup>

For the Court of Justice:

the effectiveness of the penalties imposed by the national or Community [now EU] competition authorities on the basis of Article 83(2)(a) EC [103(2)(a) TFEU] is ... a condition for the coherent application of Articles 81 EC and 82 EC [101 and 102 TFEU].<sup>44</sup>

### III. ARBITRATION AND REGULATION 1/2003

#### 1. Inapplicability of the Cooperation Mechanisms of Regulation 1/2003 to Arbitration

**21-021 Article 10 EC [4(3) TEU] not applicable to arbitration.** Arbitration is ignored in Regulation 1/2003 and, thus, it is not mentioned in Chapter IV, which provides for the cooperation mechanisms between the Commission, national competition authorities, and courts.<sup>45</sup> This should not, however, be surprising. It would not have been appropriate for the Regulation, a hard-law instrument of EU law, to include references to arbitration, which – from a strictly legal point of view – is an institution not directly subject to Article 10 EC [4(3) TEU], in the way that national courts, the judicial organs of the Member States, are. Indeed, the system of the relationship between the Commission and national courts is made up of specific and direct EU law-based powers and duties that are derived from the national courts’ nature as EU judges of general jurisdiction (*juges communautaires de droit commun*).<sup>46</sup> Such powers and duties also echo and are in a sense *leges speciales* of Article 10 EC [4(3) TEU], which remains the *lex generalis*.<sup>47</sup> Arbitration, on

43. Case C-429/07, *Inspecteur van de Belastingdienst v. X BV*, Judgment of 11 Jun. 2009, not yet reported, para. 30.

44. *Ibid.*, para. 37.

45. See para. 21-004 *supra*.

46. See J. Temple Lang, ‘Community Constitutional Law: Article 5 EEC Treaty’, *Common Market Law Review* 27 (1990): 645, at 646, who considers that the EU status of national courts flows directly from Art. 10 EC.

47. See Commission Proposal for a Council Regulation on the Implementation of the Rules on Competition Laid Down in Arts 81 and 82 of the Treaty and Amending Regulations (EEC) no. 1017/68, (EEC) no. 2988/74, (EEC) no. 4056/86 and (EEC) no. 3975/87 (‘Regulation Implementing Arts 81 and 82 of the Treaty’), COM(2000) 582 final, OJ 2000 C365E/284, Explanatory Memorandum, which notes that Art. 15 codifies ‘the existing obligation of the Commission, based on Article 10 of the Treaty [4(3) TEU], to cooperate with national courts’. See also Case C-429/07, *Inspecteur van de Belastingdienst v. X BV*, *supra* n. 44, para. 21.

the other hand, is not subject to Article 10 EC [4(3) TEU].<sup>48</sup> Indeed, the duty of cooperation in Article 10 EC [4(3) TEU] is limited only to EU institutions and to official authorities and organs of the Member States. Arbitrators do not fall under this provision, since, although enjoying jurisdictional and quasi-judicial powers, they still remain a creation of private autonomy.

**No formal cooperation under Article 15(1) of Regulation 1/2003.** This means that most of the cooperation and coordination mechanisms between national courts and the Commission provided for in Regulation 1/2003 are not transposable to arbitration.<sup>49</sup> Thus, neither Article 10 EC [4(3) TEU] nor Article 15(1) of Regulation 1/2003 can provide for a legal basis for a formal cooperation between the Commission and arbitrators in the sense of the former being bound to offer assistance on a specific competition-related issue to the latter. This means that, on the one hand, they are immune from any duty of cooperation stemming from this provision, but on the other hand, EU institutions are not bound to cooperate with them, as is the case with national courts. This question will be further discussed below,<sup>50</sup> when referring to the applicability of the Commission's Cooperation Notice to arbitration. 21-022

## 2. No Duty to Transmit to the Commission Arbitral Awards

**Inapplicability of Article 15(2) of Regulation 1/2003 to arbitral awards.** Thus, Article 15(2) of Regulation 1/2003, which provides that Member States are under a duty to forward to the Commission copies of 'written judgments' of 'national courts', does not certainly apply directly to arbitral awards and tribunals.<sup>51</sup> It might have been tempting to argue that the imposition of this administrative duty to Member States, rather than to courts, might mean that the former have to forward to the Commission 21-023

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48. That arbitration is not formally speaking subject to Art. 10 EC [4(3) TEU] is a generally accepted proposition. See, e.g., W. Van Gerven, 'L'arbitrage dans le droit européen', RDIDC 72 (1995): 67, at 73; A.P. Komninos, 'Arbitration and the Modernisation of European Competition Law Enforcement', *World Competition* 24 (2001): 211 at 228; L. Idot, 'Arbitration and the Reform of Regulation 17/62', in *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law*, eds C.-D. Ehlermann & I. Atanasiu (Oxford/Portland, 2003), 318; N. Shelkopyas, *The Application of EC Law in Arbitration Proceedings* (Groningen, 2003), 423.

49. See in this sense C. Liescher, 'Arbitration and EC Competition Law – The New Competition Regulation: Back to Square One?', *International Arbitration Law Review* 6 (2003): 84, at 92; L.G. Radicati di Brozolo, 'Antitrust: A Paradigm of the Relations between Mandatory Rules and Arbitration: A Fresh Look at the "Second Look"', *International Arbitration Law Review* 7 (2004): 23, at 33–34; L. Idot, 'Les entreprises face à la suppression de l'autorisation préalable', in *Le nouveau droit communautaire de la concurrence, Les droits de la défense face aux pouvoirs de la Commission européenne*, ed. A. Mourre (Brussels, 2004), 145; K. Hilbig, *Das gemeinschaftsrechtliche Kartellverbot im internationalen Handelsschiedsverfahren, Anwendung und Gerichtliche Kontrolle* (Munich, 2006), 166; D. Thalhammer, 'Die Rolle der Schiedsgerichte bei der Durchsetzung von EG-Kartellrecht unter dem Regime der VO 1/2003: Zugleich ein Beitrag zu 1 Ob 270/03t und § 124 KartG', *WBl.* 19 (2005): 62, at 69; M.-C. Boutard-Labarde et al., *L'application en France du droit des pratiques anticoncurrentielles* (Paris, 2008), 771; cf. W. Abdelgawad, 'L'arbitrage international et le nouveau règlement d'application des articles 81 et 82 CE', *Revue de l'Arbitrage* (2004): 253, at 266.

50. Paragraphs 21-034 et seq.

51. The duty to inform the Commission of judgments that have applied the EU competition rules, imposed by Art. 15(2) Reg. 1/2003 upon Member States, should not be confused with the

also copies of arbitral awards applying Articles 81 and 82 EC [101 and 102 TFEU]. Such an argument, however, fails not only in view of the letter of the text but also in view of its rationale, which is to make the Commission aware of possible cases of national litigation, where the former can intervene at a later stage as *amicus curiae*. Besides, states do not – indeed should not – have in place mechanisms to notify arbitral awards, so it is impossible for a Member State to know at a given time the number of arbitrations and arbitral awards. In an open and democratic society, this would be unthinkable and would certainly run counter the most fundamental principles of arbitration: privity and confidentiality.<sup>52</sup>

**21-024 Duty to transmit judgments reviewing awards.** Naturally, arbitration may be indirectly affected by Article 15(2) of Regulation 1/2003, in case state courts have exercised a review of an arbitral award, or have given judgment concerning the recognition or enforcement of an arbitral award, or have even intervened in support of the arbitration proceedings, for example, ordering a provisional measure.<sup>53</sup> All these court judgments will have to be forwarded to the Commission by the Member State in question, if EU competition law has been applied by the court.

**21-025 Caveat.** It should be stressed that it is neither sufficient nor necessary for such an EU law duty to exist, if *the arbitrators* have applied Articles 81 and 82 EC [101 and 102 TFEU]. The national court *itself* must have applied these provisions, which is more likely to have happened when the court extensively reviewed the arbitral award.<sup>54</sup> Indeed, in the recent *MDI* case, which represents the first case where a national court in the European Union refused to enforce a foreign arbitral award on public policy grounds, because of an EU competition law violation, the judgment of the Court of Appeal of The Hague was transmitted to the Commission under Article 15(2).<sup>55</sup>

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occasional duty that has been imposed by the Commission in the past upon undertakings to inform the former of the outcome of arbitral awards. This duty has been included, by way of condition or obligation, in some individual exemption decisions and in certain block exemption regulations (see Ch. 30). The new system of enforcement leaves no more room for such duty of information, unless it has been included in a commitment given to the Commission pursuant to Art. 9 Reg. 1/2003 or in the context of merger control (see Chs 30 and 46).

52. Compare H. van Houtte, 'Distribution Arbitration and European Competition Law', in *Arbitration and Commercial Distribution, Reports of the Colloquium of CEPANI of November 17th 2005* (Brussels, 2005), 106.
53. This is so, if the wider meaning of 'judgment' is followed, which also covers courts' decisions that are final in nature, yet they may be interim or partial. See, in this regard, A. P. Komminos, *EC Private Antitrust Enforcement, Decentralised Application of EC Competition Law by National Courts* (Oxford/Portland, 2008), 104.
54. Article 15(2) Reg. 1/2003 would cover also court decisions that have applied the treaty competition provisions, even if the arbitral tribunal may have not touched upon this issue.
55. Court of Appeal of The Hague, *Marketing Displays International Inc. v. VR Van Raalte Reclame BV*, Case no. 04/694 and 04/695, reported in the Commission's website, which brings together the national judgments transmitted to it under Art. 15(2) Reg. 1/2003: <[http://ec.europa.eu/competition/antitrust/national\\_courts/court\\_2005\\_046\\_nl.pdf](http://ec.europa.eu/competition/antitrust/national_courts/court_2005_046_nl.pdf)>.

### 3. Arbitration and the Amicus Curiae Mechanism

**Article 15(3) of Regulation 1/2003 and arbitration.** As for the power of the Commission 21-026 (or of national competition authorities) to submit written or oral observations ex officio to national courts pursuant to Article 15(3) of the new Regulation, again such a mechanism is neither applicable nor transposable to arbitration.<sup>56</sup> Any attempt to extend such measures to arbitration proceedings should be avoided not only as being unnecessary and disproportionately restrictive but also because it would be detrimental to the nature of arbitration and to the most fundamental principles of the arbitration process. The danger in that case lies in the intrusion of the Commission as to the very substance of arbitration, which is an expression of the will of the parties providing for a non-judicial forum for settling disputes. This intrusion would be contrary to the basic principles of privity, independence, and confidentiality of arbitration.<sup>57</sup> If competition authorities were to demand to become privy to arbitration involving competition issues, many parties might opt to transfer their arbitrations to venues outside of the EU, especially if one of the parties is not an EU national.<sup>58</sup>

**Conditions for allowing amicus curiae interventions in arbitration proceedings.** 21-027 The question remains whether the intervention of a competition authority would be possible, if the arbitration agreement itself provided for such a possibility or if the arbitrators were to give permission to this and both parties gave their consent.<sup>59</sup> In such an exceptional case, the flexibility of arbitration would advocate in favour of a positive answer. However, there are good policy reasons that plead against placing too much emphasis on the consent of the parties. In practice, it will be quite difficult for a party to the arbitration proceedings to resist the Commission's or another competition authority's intervention without raising its suspicions and thus without attracting its 'attention'. A party may in some cases *volens nolens* acquiesce in such an intervention. In other words, to condition such a mechanism solely on the parties' consent would not be appropriate.

Therefore, arbitrators should seek or allow such intervention only in those cases where either the arbitration agreement explicitly refers to this possibility or the two parties genuinely agree to ask the Commission to intervene in order to shed light on to some important competition law question.<sup>60</sup>

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56. See L. Idot, 2004, *supra* n. 49, 145; *Id.*, 'La place de l'arbitrage dans la résolution des litiges en droit de la concurrence', D. 2007.2681, 2683; Boutard-Labarde et al., 2008, *supra* n. 49, 773.

57. On the principle of confidentiality and its limits from a comparative law perspective, see J. Misra & R. Jordans, 'Confidentiality in International Arbitration: An Introspection of the Public Interest Exception', *Journal of International Arbitration* 23 (2006): 39. The principle of confidentiality may recede and, thus, allow for amicus curiae briefs by third parties only in cases of public-private, i.e., investment, arbitration. See further L. Mistelis, 'Confidentiality and Third Party Participation: *UPS v. Canada* and *Methanex Corporation v. United States*', *Arbitration International* 21 (2005): 211, at 221 et seq.

58. See J.D.M. Lew, 'EEC Law Restriction on Arbitration', *Arb* 47 (1981–1982): 117, at 119.

59. In such a case, there would be no violation of the fundamental principle of confidentiality. See C. Müller, 'La confidentialité en arbitrage commercial international: Un trompe-l'œil?', *ASA Bull.* 23 (2005): 216, at 223.

60. See C. Nisser & G. Blanke, 'Reflections on the Role of the European Commission as amicus curiae in International Arbitration Proceedings', *European Competition Law Review* 27 (2006): 174, at 179, 181; *contra* Abdelgawad, 2004, *supra* n. 49, 269, who thinks that the arbitral tribunal should be entitled to decide itself to permit the Commission's intervention without

- 21-028 Written or oral submissions?** If the above rather exceptional conditions are met, in most cases, it will be preferable to allow the European Commission to interfere only through the submission of arguments in writing, without, however, giving it the power to participate in the arbitration hearings or to have access to the file of the case and to documents produced during the proceedings. This solution has been followed in the context of NAFTA arbitration, which is certainly very different from a purely private commercial arbitration, but could be considered by analogy, always under the above conditions.<sup>61</sup>
- 21-029 The Commission's own powers to request information.** While it is true that the Commission could, if it so wished, use its own administrative powers of enforcement to request information about the arbitration proceedings or access to certain documents,<sup>62</sup> there is no reason to formalize and import this practice in to the law of arbitration. Thus, arbitrators should not allow or should allow an intervention by the Commission only exceptionally and under very stringent conditions,<sup>63</sup> irrespective of how the parties themselves choose to react to a possible request for information by the Commission under Regulation 1/2003.
- 21-030 Divergent views.** Surprisingly, however, the above proposition as to the inapplicability of the *amicus curiae* mechanism to arbitration is not shared by all commentators. Indeed, it seems that some enthusiasm about the possibility of the Commission's intervention in arbitration proceedings is expressed more by the arbitration milieu than by the antitrust enforcers themselves.<sup>64</sup> If, as we will see below, the Commission has excluded the application of its Cooperation Notice to arbitration, it is rather difficult to explain this one-sided enthusiasm.<sup>65</sup>
- 21-031 The special case of arbitration commitments.** Commentators in favour of that possibility usually refer also to the latest trend of the Commission to accept (in reality to demand) arbitration commitments by parties.<sup>66</sup> Since arbitration is used by the Commission as an important monitoring and dispute resolution mechanism, then the argument goes<sup>67</sup> that the Commission has any right and power to intervene in that 'regulatory arbitration'.<sup>68</sup>

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the parties' consent, because of the public policy nature of EU competition law, which trumps private autonomy. This author thinks, however, that this extreme position runs counter to the most fundamental notions of arbitration.

61. On this practice in the NAFTA arbitration context, see J.-G. Betto et al., 'Nouvelles tendances de l'arbitrage international', *RDAl/International Business Law Journal* (2006): 371, 378. The authors distinguish between transparency and interference. Interference by third governmental or non-governmental parties should not be allowed.
62. This the Commission could do through an 'Article 18 request' addressed to the parties to the arbitration proceedings. Art. 18 Reg. 1/2003 empowers the Commission to require such information to be supplied as is necessary to detect any agreement, decision or concerted practice prohibited by the competition rules.
63. See para. 21-027. *supra*.
64. See, e.g., Abdelgawad, 2004, *supra* n. 49, 268 et seq.; Nisser & Blanke, 2006, *supra* n. 60, 176 et seq.
65. See also A. Mourre, 'Dissenting Opinion on a Dangerous Project', *European Business Law Review* 19 (2008): 219 at 222–223.
66. See in particular Ch. 46.
67. See, in particular, Nisser & Blanke, 2006, *supra* n. 60, 179 et seq.; G. Blanke, *The Use and Utility of International Arbitration in EC Commission Merger Remedies, A Novel Supranational Paradigm in the Making?* (Groningen, 2006), 153 et seq.
68. See, in particular, M. Blessing, *Arbitrating Antitrust and Merger Control Issues* (Basle/Geneva/Munich, 2003), 3, who first uses this terminology and views positively this development.

**Rebuttal.** There are at this point two important points to be made:

21-032

- ***Ex lege intervention versus intervention on basis of arbitration agreement.*** First, there is a clear distinction between the formalized procedures provided for by Article 15 of Regulation 1/2003 and the Cooperation Notice, and the specific provisions on the Commission’s possibility to intervene as *amicus curiae* that may be contained in arbitration commitments. In this author’s view, the two must not be confused.

Indeed, any possible *amicus curiae* intervention by the Commission in the first context would have to be an *ex lege* one; however, Article 10 EC [4(3) TEU] and Article 15 of Regulation 1/2003 do not apply directly to arbitration.<sup>69</sup> On the other hand, a possible intervention by the Commission in an arbitration proceeding pursuant to commitments would not be based on the law, as above, but rather on the arbitration agreement itself. There is, in other words, an important difference in the legal basis between the two situations.

In addition, the two situations must not be confused for another, perhaps more importantly, for the reason that Regulation 1/2003 and the Cooperation Notice mechanisms are applicable only to those cases where a national court applies EU competition law. Their rationale is to enable the Commission to intervene in cases where the EU public interest requires in order to inform the court of the Commission’s position about some fundamental issue of EU competition law.

Yet, in the case of arbitration pursuant to arbitration commitments, the arbitrators in reality do not usually apply substantive EU competition law. They do not deal with such questions as the applicability of Article 81(1) EC [101(1) TFEU], the four criteria of Article 81(3) EC [101(3) TFEU] or efficiencies under Article 82 EC [102 TFEU]. These are questions that will have already been dealt with in a definitive manner by the Commission itself before it accepted the commitments.<sup>70</sup> The role of the arbitrators pursuant to the arbitration commitment is not to re-litigate competition law issues but rather to deal with technical or peripheral legal questions, such as the level of fees and royalties, the conditions of access to a network, or the commercial conditions of a divestiture.<sup>71</sup> These can at best be described as commercial law disputes; indeed, the idea is that these should not be decided by the Commission, which should rather concentrate on the competition law questions.

It is unclear to this author why these disputes raise a fundamental concern pertaining to the EU public interest, in order to apply – even by analogy – the *amicus curiae*-related provisions referred to above.<sup>72</sup>

- ***Policy reasons.*** Second, there are important policy reasons advocating a competition authority’s minimum interference with arbitration.

69. See paras 21-021 et seq. *supra*. Besides, the Cooperation Notice itself does not apply to arbitration (see paras 21-034 et seq. *infra*).

70. Of course, the Commission in the context of merger control does not apply Arts 81 and 82 EC [101 and 102 TFEU] (*ex post* enforcement) but only the Merger Regulation (Council Regulation 139/2004 of 20 Jan. 2004 on the Control of Concentrations between Undertakings (the EC Merger Regulation), OJ 2004 L24/1) (*ex ante* enforcement). In addition, the Commission uses a different analysis in merger control and proceeds on the basis of ‘competition concerns’ and not of competition law violations.

71. For further detail, see Ch. 30 *infra*.

72. See para. 21-016 *supra*.

In strictly legal terms, if an arbitration commitment contains specific provisions about the Commission's possibility to intervene in the arbitration proceedings, the subsequent arbitration agreement will in effect integrate those provisions, too. So the possibility of the Commission's intervention will be an integral part of the arbitration agreement. What, however, is possible in law, should be avoided for policy reasons. An arbitration procedure that does not give the impression of independence and privity but appears as guided by and dependent on the Commission or any other public competition authority may not be perceived as an independent dispute resolution method leading to enforceable arbitral awards akin to judicial decisions. That would be detrimental to arbitration as an institution and to the effectiveness of the arbitration commitment (as a competition law enforcement tool) itself.

While contractual freedom remains the rule, arbitration is a very specific mechanism that is not just the creation of that freedom but is also recognized by the law as a dispute resolution mechanism with specific legal effects attached to it. Providing for unorthodox arbitration clauses might bring into question these specific legal effects that legal systems attach to arbitration.

To give a practical example, an overly unorthodox 'regulatory' arbitration pursuant to an antitrust-related commitment might not be recognized as arbitration internationally. A foreign court might not be ready to recognize pursuant to the New York Convention<sup>73</sup> an 'arbitral award' that has been rendered by 'regulatory arbitrators', who in reality acted as technical experts for the Commission or where the Commission enjoyed a dominant role in the arbitration proceedings.

**21-033 Recommendation.** Thus, this author's view is that the Commission's undue interference with the arbitration proceedings should be avoided, since it does not do justice to the credibility and independence of arbitration, as this is a task usually exercised by courts or by institutional arbitration bodies. In sum, while an intervention in the form of *amicus curiae* may on an ad hoc basis be acceptable or even desirable,<sup>74</sup> it should certainly not be institutionalized.<sup>75</sup> Besides, the Commission itself has not shown any interest in playing such a role in arbitration proceedings;<sup>76</sup> this is actually easy to understand because the Commission (like other antitrust authorities) has much more direct powers at its disposal. Indeed, in exceptional cases, the Commission can, under Article 18 of Regulation 1/2003,<sup>77</sup> send requests for information to the parties to an arbitration and, in the extreme, it can even open proceedings, if some important public interest is at stake. The fact there is an ongoing arbitration proceeding naturally does not affect the Commission's powers.<sup>78</sup>

73. United Nations New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards; entry into force on 7 Jun. 1959; published in: 330 UNTS 38 (1959), no. 4739.

74. To the extent it is explicitly allowed or provided for in the arbitration agreement itself or both parties genuinely request the arbitrators to allow it. See paras. 21-027 et seq. *supra*.

75. Compare R. Nazzini, 'A Principled Approach to Arbitration of Competition Law Disputes: Competition Authorities as *amici curiae* and the Status of their Decisions in Arbitral Proceedings', *European Business Law Review* 19 (2008): 89, at 105, who generally views the possibility of *amicus curiae* intervention only 'in exceptional circumstances'.

76. See para. 21-034 *infra* on the Commission's exclusion of arbitration from its Cooperation Notice.

77. See *supra* n. 5.

78. Compare, e.g., M. Fernández Salas, et al., 'Access to Gas Pipelines: Lessons Learnt from the *Marathon Case*', *EC Competition Policy Newsletter* (2004-2): 41, at 42, describing the

IV. ARBITRATION AND THE COOPERATION NOTICE

A. GENERAL EXCLUSION OF ARBITRATION FROM THE COOPERATION NOTICE

**Wording of the Notice.** The absence of any reference to arbitration in Regulation 1/2003 may not be so problematic. However, one would have welcomed at least a reference to arbitration in the accompanying soft law measures of modernization, in particular, in the Notice on cooperation between the Commission and national courts.<sup>79</sup> Regrettably,<sup>80</sup> not only is the Notice silent, but it also actually excludes by implication arbitration tribunals, by adopting, in our view entirely unreasonably and unnecessarily, a definition of ‘court’ that follows the ‘court or tribunal’ criterion of Article 234 EC [267 TFEU],<sup>81</sup> as interpreted by the Court of Justice.<sup>82</sup> As a result of a consistent line of case law, arbitrators do not fall under this criterion and cannot therefore make preliminary references to Luxembourg.<sup>83</sup>

Thus, paragraph 1 states that ‘for the purpose of this notice, the “courts of the EU Member States” (hereinafter “national courts”) are those courts and tribunals within an EU Member State that can apply Articles 81 and 82 EC [101 and 102 TFEU] and that are authorized to ask for a preliminary question to the Court of Justice of the European Communities pursuant to Article 234 EC [267 TFEU]’.

**Criticism.** It is not clear whether this language intended implicitly to exclude arbitration, although there is some evidence that this may well have been the intention.<sup>84</sup>

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*Marathon* case. There, at the same time as filing a complaint with the Commission, Marathon and two of the companies involved entered into an arbitration proceeding, in which Marathon requested damages. When the arbitration case was concluded with an out-of-court settlement, Marathon withdrew its complaint. However, the Commission took the view that it would be in the EU interest to pursue the matter on an *ex officio* basis.

79. *Supra* n. 11.

80. See L. Idot, *Droit communautaire de la concurrence, Le nouveau système communautaire de mise en œuvre des articles 81 et 82 CE* (Paris/Brussels, 2004), 81.

81. Article 234 EC [267 TFEU] provides: ‘The Court of Justice shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of this Treaty; (b) the validity and interpretation of acts of the institutions of the Union and of the ECB; (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide. Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice’.

82. Cooperation Notice, *supra* n. 11, para. 1.

83. Case 102/81, *Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG* [1982] ECR 1095, para. 13; Case C-126/97, *Eco Swiss China Time Ltd v. Benetton International NV* [1999] ECR I-3055, para. 34; Case C-125/04, *Guy Denuit and Betty Cordenier v. Transorient – Mosaique Voyages and Culture SA* [2005] ECR I-923, para. 13. For indirect possibilities to seize the Court of Justice through the intervention of national courts, see A.P. Komninos, ‘Assistance to Arbitral Tribunals in the Application of EC Competition Law’, in *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law*, eds C.-D. Ehlermann & I. Atanasiu (Oxford/Portland, 2003), 363 et seq.

84. See E. Paulis, ‘Panel Discussion: Administrative Antitrust Authorities: Adjudicative and Investigatory Functions’, in *International Antitrust Law and Policy 2002, Annual Proceedings of the*

Irrespective of the exclusion of arbitration, this wording is also unfortunate, because it is Article 10 EC [4(3) TEU] and not 234 EC [267 TFEU] that should guide the Commission in its cooperation with national courts. Indeed, as explained above,<sup>85</sup> Article 15 of Regulation 1/2003 and, in a certain sense, also the Cooperation Notice, are *leges speciales* of the *lex generalis* of Article 10 EC [4(3) TEU]. This means that an entity considered as a ‘court’ in the national legal order should be able to cooperate with the Commission on the basis of Article 10 EC [4(3) TEU] and of the principles of cooperation established in the Court of Justice’s rulings in *Stergios Delimitis v. Henninger Bräu AG*<sup>86</sup> and *Automec Srl v. Commission (II)*.<sup>87</sup> In other words, the term ‘court or tribunal’ in Article 234 EC [267 TFEU] may be narrower than what may nationally be considered a ‘court’. In this author’s view, it would be inappropriate for the Commission to shut its doors to such a ‘court’, since the latter, being an organ of the Member State in question, should be able to seize the Commission according to Article 10 EC [4(3) TEU], notwithstanding paragraph 1 of the new Cooperation Notice.

## B. APPLICATION OF THE COOPERATION NOTICE BY ANALOGY BY ARBITRATORS

**21-036 Informal and discretionary cooperation.** In any event, however, it is reasonable to believe that the Commission intended to exclude arbitration only from the specific procedural framework of the new Cooperation Notice, which contains also self-imposed deadlines for the Commission’s assistance, while entertaining requests from arbitrators on an ad hoc and fully discretionary basis, rather than being bound to engage in a dialogue with arbitrators as it is bound to do so with courts.<sup>88</sup> The soft-law nature of the Cooperation Notice means that its mechanism could be used by analogy also by arbitrators.<sup>89</sup>

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*Fordham Corporate Law Institute*, ed. B. Hawk (New York, 2003), 459, who explains that, indeed, the Commission was probably ‘frightened’ to grant full access to arbitrators for the same reasons as maybe the ECJ was. The exclusion of arbitration from the mechanisms of the Cooperation Notice has been criticized by many stakeholders in their comments on the Commission’s modernization package. See, e.g., the comments by professor Laurence Idot, the Joint Working Party of the Bars and Law Societies of the UK on Competition Law, and the law firm Clifford Chance (comments available at <[http://ec.europa.eu/comm/competition/antitrust/legislation/procedural\\_rules/comments](http://ec.europa.eu/comm/competition/antitrust/legislation/procedural_rules/comments)>).

85. See para. 21-021 *supra*.

86. Case C-234/89, *Stergios Delimitis v. Henninger Bräu AG* [1991] ECR I-935, para. 53.

87. Case T-24/90, *Automec Srl v. Commission (II)* [1992] ECR II-2223, para. 90.

88. See Paulis, 2003, *supra* n. 85, 459–460.

89. As to the old Cooperation Notice (*supra* n. 8), see P.J. Slot, ‘The Enforcement of EC Competition Law in Arbitral Proceedings’, LIEI 23, no. 1 (1996) 101: at 112; L.G. Radicati di Brozolo, ‘Arbitrato, diritto della concorrenza, diritto comunitario e regole di procedura nazionali’, Riv Arbitrato 9 (1999): 665 at 676. As to the post-2004 system of enforcement and the current Cooperation Notice (*supra* n. 11), see Komminos, 2001, *supra* n. 48, 228; W.P.J. Wils, ‘Community Report’, in *The Modernisation of EU Competition Law Enforcement in the European Union, FIDE 2004 National Reports*, ed. D. Cahill (Cambridge, 2004), 698; P. Heitzmann & J. Grierson, ‘The French Approach to Arbitrating EC Competition Law in the Light of the Paris Court of Appeal’s Decision in *SNF v. Cytec Industries*’, in *Practical Aspects of Arbitrating EC Competition Law*, eds T. Zuberbühler & C. Oetiker (Zurich/Basle/Geneva, 2007), 200, fn. 37.

**Arguments in favour of informal cooperation.** Thus, on an informal basis, arbitrators should be able to seek cooperation, whenever a legal or factual problem arises in regard to a question of enforcement of EU competition law. This is for the following reasons: **21-037**

- Any disrespectful attitude of the Commission towards arbitration in this regard would run counter to the long-established recognition of arbitration in all Member States as an alternative judicial forum.
- At the same time, it would not serve the Commission’s purpose to further the decentralized civil enforcement of EU competition law, and it might alienate arbitrators, with the possible repercussion that the latter would rather suppress a difficult competition law issue, instead of running the risk to decide it wrongly themselves and consequently to expose their award to annulment.
- Finally, a negative approach towards such requests of assistance by arbitrators would not be in conformity with the Commission’s central role in the enforcement of the competition law regime of the Treaty.<sup>90</sup>

**Precedents of cooperation.** Indeed, in the past, the Commission has been quite open in providing assistance to arbitrators applying EU competition law. The Commission has on occasions treated arbitral tribunals in the same way as national courts under the old Notice on cooperation.<sup>91</sup> In one reported case, the Commission received and responded to an application for legal information by a body defined as ‘Tribunal Arbitral de Barcelona’, an ad hoc arbitration tribunal.<sup>92</sup> The information sought referred to an alleged dominant position of a public undertaking that controlled the bidding and executing of certain infrastructure projects in a Spanish region. It is interesting that the arbitration tribunal wanted to know whether the undertaking in question occupied a dominant position ‘in the sense of the Court of Justice’s case law’.<sup>93</sup> One can only suppose that this is a question that normally would have been addressed to the Court of Justice itself, had the referring body been a court. The case thus demonstrates how the Commission can remedy in some instances the inability of arbitrators to seize the Court of Justice with a preliminary reference. **21-038**

**Information covered.** As arbitrators will be applying Article 81(3) EC [101(3) TFEU], which admittedly entails more elaborate competition-related economic and legal questions, and as arbitration will increasingly be seen more favourably by the Commission, the latter is expected to cooperate more often with arbitral tribunals in appropriate cases. As for the kind of assistance that arbitrators could request, this would not be substantially different from that, which the courts may request.<sup>94</sup> It covers the following: **21-039**

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90. According to Art. 85 EC [105 TFEU], ‘the Commission shall ensure the application of the principles laid down in Articles 81 and 82 [101 and 102 TFEU]’.

91. See J. Temple Lang, ‘Panel Discussion: International Arbitration’, in *International Antitrust Law and Policy 1994, Annual Proceedings of the Fordham Corporate Law Institute*, ed. B. Hawk (New York/The Hague, 1995), 418; L. De Gryse, ‘Quelques propos sur L’arbitrage en matière des brevets d’invention’, in *Jura vigilantibus, Antoine Braun, les droits intellectuels, le barreau* (Brussels, 1994), 114; L. Simont, ‘Arbitrage et droit de la concurrence – Quelques réflexions d’un arbitre’, *RDAI/IBLJ* (1998): 547, at 550; T. Eilmansberger, ‘Die Bedeutung der Art. 81 und 82 EG für Schiedsverfahren’, *SchiedsVZ* 4 (2006): 5, at 12.

92. See Joris, 1998, *supra* n. 9, 48.

93. *Ibid.*

94. See, e.g., para. 21 et seq. of the Cooperation Notice, *supra* n. 11. Also see paras. 21-005 et seq. *supra*.

- factual information, for example, questions on the identity of the undertakings concerned, or
- information on whether a certain case is pending before the Commission, or
- whether the latter has reached a decision or a reasoned opinion in this matter.

It may also refer to the following:

- a legal issue of EU competition law, as well as to
- economic data, such as statistics, market characteristics, and economic analyses.<sup>95</sup>

**21-040 Conditions for cooperation.** Whether the request of such information or assistance by the Commission is desirable is, of course, only for the arbitrators to decide. However, it is a question of the law governing the arbitration procedure (*lex arbitri*) and of the arbitration clause itself, whether an arbitrator may use such a facility *sua sponte*. This is a sensitive issue, because the privity of the arbitral process recedes, and arbitrators will have to show extreme diligence. Indeed, according to one view, arbitral tribunals should abstain from seizing the Commission, since the parties have submitted their dispute only to them and the applicability of Articles 81 and 82 EC [101 or 102 TFEU] is still a question of law, which only they should deal with.<sup>96</sup>

Most likely, they could take such an initiative:

- if one of the parties has filed a complaint with the Commission, thus having brought the matter already to its attention, provided both parties consent, or
- if the terms of reference of the arbitration allow it.<sup>97</sup>

In any case, specific consultations with and hearing of all parties seem to be necessary.<sup>98</sup> Indirectly, an arbitrator could enjoin the parties to supply him/her with certain legal or economic information or data while stressing to them that this information could be easily requested from the Commission, if they consented to that.<sup>99</sup>

95. See also P. Peyrot, 'Expert Determination of Competition Issues', in *Practical Aspects of Arbitrating EC Competition Law*, eds T. Zuberbühler & C. Oetiker (Zurich/Basle/Geneva, 2007), 109.

96. See L. Goffin, 'L'arbitrage et le droit européen', *Revue de Droit International et de Droit Compare* 67 (1990): 315 at 333.

97. See Simont, *supra* n. 91, 550 et seq., according to whom the arbitrators, who are contractually bound with the parties, could be personally liable, if they exposed them to proceedings (before the Commission) that could lead to fines. Compare also H. Lesguillons, 'La solitude pondérée de l'arbitre face au droit de la concurrence', *GP* 123, nos 148–149 (2003): 17, at 20; Van Houtte, *supra* n. 52, 106, who stresses the arbitrators' duty of confidentiality vis-à-vis the parties.

98. See M. Blessing, 'Introduction to Arbitration – Swiss and International Perspectives', in *International Arbitration in Switzerland, An Introduction to and a Commentary on Arts 176–194 of the Swiss Private International Law Statute*, eds S.V. Berti & H. Honsell et al. (Basle/The Hague/London/Boston, 2000), 235; G. Blanke & R. Nazzini, 'Arbitration and ADR of Global Competition Disputes: Taking Stock (Part III)', *GCLR* 1 (2008): 133, at 137.

99. See Simont, *supra* n. 91, 550. For such an indirect possibility for the Commission to assist national proceedings, see para. 42 of the 1993 Cooperation Notice, *supra* n. 8, which stated that the Commission may be seized indirectly to assist the course of a national proceeding, when parties have been ordered by the court concerned to provide certain information. However, under the new Cooperation Notice (*supra* n. 11), parties no longer enjoy such an autonomous right to seize directly the Commission, and it is only open to national courts to ask for the Commission's assistance.

**Professional and business secrets.** Any cooperation between the Commission and arbitrators would raise some important questions regarding the protection of professional and business secrets. As explained above,<sup>100</sup> the Notice on cooperation with national courts provides for some safeguards: in particular, before transmitting any information, the Commission asks the national court whether it can offer a guarantee that it will protect confidential information and business secrets and the court will be so bound based on a combined reading of Articles 10 and 287 EC [4(3)TEU and 339 TFEU].<sup>101</sup> The problem is that, since arbitration is not subject to Article 10 EC [4(3) TFEU], the above safeguards cannot formally apply to it. This gap may indeed be a serious limitation for a more frequent dialogue between the Commission and arbitrators.<sup>102</sup> **21-041**

C. A NOTICE ON COOPERATION WITH ARBITRATORS?

**Advantages.** Although not necessary, it might still be desirable for the Commission to publish a Notice or perhaps make a public announcement on cooperation with arbitration tribunals.<sup>103</sup> Such a Notice could provide for a more structured dialogue between the Commission and arbitrators, while increasing the transparency of the whole system of cooperation. It would also raise the EU competition law awareness of arbitrators and of the parties to an arbitration, without encroaching on the flexibility and privity of the arbitral process. **21-042**

**No legal obligations.** In any case, the Commission would not be legally bound to provide such assistance to arbitral tribunals, although it is evident that it is to its interest to do so.<sup>104</sup> This is a direct consequence of the non-applicability of Article 10 EC [4(3) TFEU] to arbitrators. Since the latter are not under any duty, as a question of EU law, as against the EU institutions, similarly the Commission should not be so bound. However, a Notice would essentially be a list of best practices and procedures available to arbitrators for seizing the Commission. It should be based more on discretion than on obligation, and the Commission should be ready to give rather than take, precisely because it would enhance the overall effectiveness of the competition rules to offer assistance to arbitrators willing to apply such rules. **21-043**

D. INDIRECT CHANNELS OF COOPERATION

In addition to such ways for arbitrators to seize the Commission, informal and indirect channels may equally be as effective. **21-044**

**Guidance letters.** Thus, the parties to an arbitration proceeding may seize the Commission and request a guidance letter under the Notice on guidance letters.<sup>105</sup> For such an attempt to **21-045**

100. See paras. 21-010 et seq. *supra*.

101. *Ibid.*

102. Compare R. Nazzini, *Concurrent Proceedings in Competition Law, Procedure, Evidence and Remedies* (Oxford, 2004), 366–369.

103. See Komninos, 2001, *supra* n. 48, 229.

104. See K. Lenaerts & M. Pittie, ‘Conclusions générales’, in *L’arbitrage et le droit européen, Actes du colloque international du CEPANI du 25 avril 1997*, eds R. Briner & Y. Derains et al. (Brussels, 1997), 218.

105. 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), OJ 2004

be successful, the three positive and two negative cumulative conditions, set out in the Notice, must be satisfied:<sup>106</sup>

- the question involved must be novel;
- its clarification must be useful from an economic point of view;
- the parties must provide the Commission with complete information;
- there must be no identical or similar case pending before the European Courts; and
- there must be no Commission, national competition authority, or national court pending proceeding involving the applicant.

**21-046 Fulfilling the conditions.** The latter condition will be fulfilled even if the applicant is a party to arbitration proceedings, first, because arbitration is not mentioned in the Notice and, second, because the text here obviously has in mind the existence of a more direct and structured cooperation mechanism between the Commission and national courts that Regulation 1/2003 and the new Cooperation Notice expressly provide for.<sup>107</sup> Since arbitration is not mentioned in Regulation 1/2003 and is indeed excluded by the Cooperation Notice, there is no reason to deny parties to an ongoing arbitration the possibility to request a guidance letter from the Commission.

**21-047 Channel only available to the parties.** In any event, such a channel would be clearly open only to the parties and not to arbitrators deciding a case. Even if the latter could use such a mechanism, which is not the case, they should actually avoid this informal venue because of the lack of any transparency. If, on the other hand, a party to the arbitration proceedings contacted the Commission (or a national competition authority) on a specific issue, and if the latter finally issued a reasoned opinion or guidance letter in response to such communication, undoubtedly that opinion or letter, although formally not binding on the arbitration proceedings, would carry a certain degree of persuasiveness that the arbitral tribunal would welcome and certainly not ignore.

**21-048 Caveat.** However, even in such cases, the tribunal should be very cautious in taking into account such statements by the Commission, because they are necessarily based on information provided to the Commission by one of the party litigants. More general statements explaining in general terms the law and economics in certain areas would be less problematic than statements relying on information provided by the party that requested the guidance letter and offering specific answers to specific questions.

#### E. COOPERATION WITH ARBITRATION TRIBUNALS SITTING OUTSIDE THE EU

**21-049 Premise.** It should finally be noted that any informal cooperation between arbitrators and the Commission should not be reserved to arbitration tribunals sitting within the EU but should be available for all international arbitration tribunals irrespective of the seat of the arbitration.

**21-050 ‘Nationality’ of the tribunal.** In the first place, in today’s globalized commercial world, it would be futile to distinguish between EU and non-EU arbitral tribunals, since it is quite often difficult to identify the ‘nationality’ of an arbitral tribunal.

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C101/78. The Notice sets out the procedure to follow when the Commission offers to parties guidance in exceptional circumstances of ‘genuine uncertainty’, referring to ‘novel or unresolved questions for the application of Articles 81 and 82 [101 and 102]’ (*Ibid.*, para. 5).

106. *Ibid.*, para. 9.

107. See paras. 21-021 et seq. *supra*.

**Effect on the internal market.** Second, if the main duty and concern of the European Commission is to ensure that the principles of Articles 81 and 82 EC [101 and 102 TFEU] are effectively applied and that the conditions of free and undistorted competition are safeguarded in the European Union, it should not be important where an arbitration tribunal sits but rather whether some potentially anticompetitive agreements or practices might affect the common market.<sup>108</sup> EU competition law may be enforced extraterritorially against anticompetitive acts, as long as the latter are implemented or produce substantial effects inside the EU territory, no matter if they were concluded in or directed from a third country.<sup>109</sup> By the same token, if there is an ongoing arbitration outside the European Union and if an issue arises pertaining to EU antitrust law, it would be rather contradictory for the Commission to deny access to its resources to such an arbitral tribunal. The Commission should entertain such a request without examining the nationality of the arbitrators and parties involved or the applicable law of the dispute (*lex causae*). The only concern must be whether there is a genuine dispute, which *prima facie* relates to conduct potentially caught by the EU competition rules. **21-051**

## V. CONCLUSIONS

As EU competition law questions arise more often in international arbitration, there may be cases where the arbitration tribunal may wish to engage in some form of dialogue or cooperation with the European Commission (or other national competition authorities). Such cases are rare but cannot be excluded. The formal channels of cooperation existing between the Commission and national courts in the EU are neither available nor transposable to arbitration. Proposals to impose direct or indirect duties on arbitration tribunals based on EU law provisions of cooperation should be resisted. This does not mean that there should be no opportunity of informal cooperation, especially when this is desired by the arbitrators themselves. The Commission has, indeed, in the past offered such assistance to arbitrators, and in all likelihood, it will continue to do so. In all such cases, however, the basic principles governing arbitration, in particular, confidentiality, privity, and independence, must always be safeguarded, and the arbitrators must exercise related options very cautiously and after hearing the parties and obtaining their consent. **21-052**

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108. See A. Rigozzi, 'L'art. 85 du Traité CE devant le juge civil Suisse: Les contrats de distribution à l'égard de l'art. 19 LDIP et la nouvelle loi fédérale sur les cartels', *Swiss Papers on European Integration*, No. 2/96 (Berne/Zurich, 1996), 57, who goes even further in suggesting that the Commission, in order to ensure the effectiveness of EU competition enforcement, should also entertain requests of assistance by Swiss courts.

109. See Case T-102/96, *Gencor v. Commission* [1999] ECR II-753, para. 90, which proved more 'daring' in asserting jurisdiction over foreign conduct than its ECJ predecessors that followed the 'economic entity' and 'place of implementation' theories. See Case 48/69, *Imperial Chemical Industries Ltd v. Commission (Dyestuffs)* [1972] ECR 619, and Joined Cases 89/85, 104/85, 114/85, 116/85-117/85 and 125/85 to 129/85, *A. Ahlström Osakeyhtiö et al. v. Commission (Woodpulp I)* [1988] ECR 5193, respectively. In any event, it is now fair to say that the EU follows a pure effects doctrine.

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