



URÍA MENÉNDEZ

Uniform application of Arts. 101-102 TFUE

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I. Introduction

- Regulation 1/2003: the challenge and its consequences
- Convergence on substantive law
- Convergence on procedural law and administrative practice

II. Regulation 1/2003: The challenge and its consequences

- Decentralization of application of arts. 101 and 102 TFUE:
 - Commission loses monopoly + obligation of NCA and Courts to apply these provisions
 - Abolition of notification process: Block exemptions
 - Improvement of enforcement tools
 - Need to cooperate with NCA (ECN) and Courts
- In theory, only convergence of substantive law and freedom on procedures and administrative practice (para. 4 Cooperation Notice): fines, standard of proof, deadlines, hearings, access to file, etc.

III. Convergence of substantive law (i)

- Commission: responsible for competition policy (but not exclusive competence – para. 43 Notice)
- Art 3.1: Obligation to apply EU law (not facultative)
- Art. 3.2 of Regulation 1/2003:
 - Convergence rule only for art. 101 TFUE
 - No convergence for art. 102 TFUE: negative effects?
 - No convergence for merger control: *minority shareholdings? Art. 101 TFUE associated with merger?*

III. Convergence of substantive law

(ii)

- **Problems** to ensure uniform application:
 1. Not application of arts. 101-102 TFUE to real EU situations:
 - No legal certainty for pan-European problems. Inconsistent application of EU law
 - National application of Block exemptions but non-binding EU guidelines?
 - No EU enforcement/monitoring (no info to the Commission)
 - Avoidance of ex-ante measures (arts. 11.4 and 11.6)
 - Avoidance of ex-post control measures (*amicus curiae* / preliminary rulings)

III. Convergence of substantive law

(iii)

- **Problems** to ensure uniform application:
 2. If arts. 101-102 are correctly applied:
 - 2.1 Art. 11.4:
 - communication to the EU too late;
 - no access to the correspondence exchanged: violation of rights of defense after Lisbon Treaty? JECHR *Meranini*; = *ratio as amicus curiae*
 - is complete information provided to the EU? parties' input needed
 - 2.2 Art. 11.6: Very difficult: insufficient term to be implemented (supra)
 - 2.3 Art. 13: real *ne bis in idem*? Only for DG COMP! (ECJ C-375/09 *Polska*). Inconsistent approach with art. 9 proposal of Directive on damages
 - 2.4 Art. 11.5/11.6 + aps. 46 & 48 of the Notice: advisable compulsory information to other NCA?

III. Convergence of substantive law (iv)

- **Problems** to ensure uniform application:
 3. If “all cases” are dressed as EU law:
 - Improper transplant of EU law procedural principles to purely domestic and minor situations: fines, attribution of liability to parent companies, etc.

IV. Convergence of procedural law

(i)

- Regulation 1/2003: art 5 (kind of decisions)
- **Soft-law**: voluntary convergence of procedures “inspired” in the Commission’s own practice: leniency notice; notice on fines (ex. Spain –questioned by Courts); inspection and enforcement tools, etc.
- Unnecessary “copy cat” against own tradition (ex: no access to documents of the file? fines?)
- Preferable voluntary convergence on best practices of all ECN + the Commission?



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