

Following an Introduction in Part I, Part II of the Rules deals with appeals to the Tribunal under the Competition Act<sup>241</sup>; Part III is concerned with proceedings under the Enterprise Act, that is appeals against penalties in merger and market investigations<sup>242</sup> and reviews of merger and market investigation references<sup>243</sup>. Part IV of the Rules deals with claims for damages under sections 47A and 47B of the Competition Act<sup>244</sup>, and Part V contains provisions on matters such as hearings, confidentiality, decisions of the Tribunal, appeals to the Court of Appeal and Article 234 references to the ECJ<sup>245</sup>.

(viii) Civil courts

Where a warrant is required to enter premises under section 28 of the Competition Act 1998, this must be obtained from a judge of the High Court<sup>246</sup>. The High Court may also issue warrants to enter premises in relation to investigations under the EC competition rules<sup>247</sup>.

Actions may be brought in the High Court where there are infringements of Articles 81 and 82 of the EC Treaty<sup>248</sup> or the Chapter I and II prohibitions<sup>249</sup>. Where the CAT has already found such an infringement, its decisions are binding in proceedings before the ordinary courts<sup>250</sup>. As noted above, the Enterprise Act makes provision for the Lord Chancellor to adopt regulations for the transfer of cases to and from the CAT.

(ix) Criminal courts

The Competition Act 1998 and the Enterprise Act 2002 create a number of criminal offences. Most notably, the Enterprise Act establishes the 'cartel offence', the commission of which could attract a prison sentence of up to five years as well as a fine<sup>251</sup>. The cartel offence is described in detail in chapter 10<sup>252</sup>. Under the Competition Act, various criminal offences may also be committed where investigations are obstructed, documents are destroyed or falsified or where false or misleading information is provided<sup>253</sup>. It is also a criminal offence to obstruct investigations conducted under the EC competition rules<sup>254</sup>.

241 On appeals under the Competition Act, see ch 10, pp 398-403.

242 See ch 11, p 424 and ch 22, p 907.

243 See ch 22, pp 907-908 (mergers) and ch 11, pp 424-425 (market investigations).

244 See ch 10, p 407.

245 On Article 234 references, see ch 10, pp 403-405.

246 Competition Act 1998, s 28(1) and s 59; in Scotland the relevant court is the Court of Session: *ibid*.

247 CA 1998, ss 62 and 63.

248 On the enforcement of the EC competition rules in national courts, see ch 8.

249 On the enforcement of the Competition Act in the civil courts, see ch 10, pp 361-362.

250 Enterprise Act 2002, s 20 which inserts a new s 58A into the Competition Act 1998.

251 EA 2002, s 190.

252 See ch 10, pp 398-395.

253 Competition Act 1998, ss 42-44: see ch 10, pp 369-370.

254 CA 1998, s 65.

### 3. THE RELATIONSHIP BETWEEN EC COMPETITION LAW AND NATIONAL COMPETITION LAWS

#### (A) Introduction

As noted earlier in this chapter, most Member States now have systems of competition law modelled upon Articles 81 and 82<sup>255</sup>. It follows that many cases will have the same outcome, whether they are investigated under EC or under domestic law: for example, a horizontal price-fixing agreement would infringe Article 81(1), and would normally also be caught by any domestic system of competition law in the Community, unless, for example, it occurred in a sector which was not subject to the domestic rules. However, even though there is a high degree of convergence between EC and domestic competition law, the possibility remains that there could be different outcomes depending on which system of law is applied. In some cases domestic law may be more generous than EC law: for example, under UK competition law horizontal agreements other than hard-core cartels are generally not caught by the Chapter I prohibition in the Competition Act 1998 if the combined market share of the parties is less than 25%<sup>256</sup>; EC law places the market share threshold at the lower level of 10%<sup>257</sup>. A further example of more generous treatment is that vertical agreements (other than agreements for the maintenance of resale prices) are excluded in their entirety from the Chapter I prohibition in the Competition Act; EC law provides block exemption for many vertical agreements, but not on such generous terms as the UK exclusion<sup>258</sup>.

In other cases, the possibility exists that domestic law could have a stricter effect than EC law. For example, under UK law it is possible for the OFT to refer a market for investigation to the Competition Commission, and the Commission has power to adopt remedies in order to address any adverse effects on competition that it may identify<sup>259</sup>; no such power exists under EC law. German law may apply more strictly to oligopolistic markets than Articles 81 and 82 EC; and French law adopts a stricter approach to some refusals to supply than EC law.

Much thought has gone into the issue of conflicts between EC and domestic competition law over the years<sup>260</sup>. The starting point is that Community law takes precedence over national law, so that where a clash occurs it is the former which must be applied<sup>261</sup>: in *Walt Wilhelm v Bundeskartellamt*<sup>262</sup> the ECJ ruled

255 See pp 58-60 above.

256 See ch 9, pp 319-321.

257 See ch 3, pp 133-135.

258 See ch 16, pp 617-641; in practice this difference is of little significance, and it may be that the UK exclusion will be withdrawn in the near future: *ibid*, pp 646-651.

259 See ch 11 generally on market investigations under the Enterprise Act 2002.

260 See eg Markert 'Some Legal and Administrative Problems of the Co-existence of Community and National Competition Law in the EC' (1974) 11 CML Rev 92; Stockmann 'EC Competition Law and Member State Competition Laws' [1987] Fordham Corporate Law Institute (ed Hawk) pp 265-300; Kerse *EC Antitrust Procedure* (Sweet & Maxwell, 4th ed 1998) pp 445-458; Bellamy and Child *European Community Law of Competition* (Sweet & Maxwell, 5th ed, 2001), ed Roth) paras 10-074 to 10-080; Whish *Competition Law* (Butterworths, 4th ed, 2001) pp 322-329; Goyder *EC Competition Law* (Oxford EC Law Library, 4th ed, 2003) pp 440-445.

261 See Case 6/64 *Costa v ENEL* [1964] ECR 585, [1964] CMLR 425; Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal* [1978] ECR 629, [1978] 3 CMLR 263; Case C-213/89 *R v Secretary of State for Transport, ex p Factortame (No 2)* [1991] 1 AC 603, [1990] 3 CMLR 1; Case C-221/89 *R v Secretary of State for Transport, ex p Factortame Ltd (No 3)* [1991] ECR I-3905, [1991] 3 CMLR 589.

262 Case 14/68 [1969] ECR I, [1969] CMLR 100.

that conflicts between the rules of the Community and national rules on cartels must be resolved by applying the principle that Community law takes precedence. However the *Walt Wilhelm* judgment did not provide answers to all the situations that could arise: for example, could a Member State prohibit an agreement that the Commission had individually exempted, or which benefited from a Community block exemption<sup>263</sup>? These matters are now dealt with by the Modernisation Regulation.

### (B) The Modernisation Regulation

Under the régime introduced by the Modernisation Regulation<sup>264</sup>, the Commission shares the competence to apply Articles 81 and 82 with national competition authorities ('NCAs') and national courts; of course NCAs and national courts can also apply domestic law. Member States are required by Article 35 of the Modernisation Regulation to designate the authorities responsible for the application of Articles 81 and 82. Recitals 8 and 9 and Article 3 of the Modernisation Regulation deal with the relationship between Articles 81 and 82 and national competition laws.

#### (i) Obligation to apply Articles 81 and 82

Recital 8 states that, in order to ensure the effective enforcement of Community competition law, it is necessary to oblige NCAs and national courts, where they apply national competition law to agreements or practices, to also apply Articles 81 or 82 where those provisions are applicable. Article 3(1) therefore provides that, where NCAs or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices that may affect trade between Member States, they shall also apply Article 81; similarly they must apply Article 82 to any abuse prohibited by that provision. The Commission will publish guidance on the concept of trade between Member States in due course<sup>265</sup>.

#### (ii) Conflicts: Article 81

Recital 8 of the Modernisation Regulation states that it is necessary to create a 'level playing field' for agreements within the internal market. What this means is that, if an agreement is not prohibited under EC competition law, it should not be possible for an NCA or national court to apply stricter national competition law to it. Article 3(2) therefore provides that the application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member

263 The ECJ declined to give an answer to this question in Case C-70/93 *Bayerisch Motoren Werke AG v ALD Auto-Leasing* [1995] ECR I-3439, [1996] 4 CMLR 478 and Case C-266/93 *Bundeskartellamt v Volkswagen ACT and VAG Leasing GmbH* [1995] ECR I-3477, [1996] 4 CMLR 478, since it concluded that the agreements under consideration in those cases were not covered by the block exemption for motor car distribution in force at that time.

264 See n 1 above.

265 See ch 7, p 252.

States but which do not restrict competition within the meaning of Article 81(1) or which fulfil the conditions of Article 81(3) or which are covered by a block exemption. It follows, therefore, that, in so far as an agreement or agreements affect trade between Member States, but do not infringe Article 81(1) or do satisfy the criteria set out in Article 81(3), it would not be possible to take action against them under the market investigation provisions of the Enterprise Act 2002.

#### (iii) Conflicts: Article 82

The position in relation to Article 82 is different. Recital 8 of the Modernisation Regulation states that Member States should not be precluded from adopting and applying on their territory stricter national competition laws which prohibit or impose sanctions on unilateral conduct: an example of such a law would be one that is intended to protect economically dependent undertakings. Article 3(2) therefore makes provision to this effect. It follows therefore that it would be possible to take action under the market investigation provisions of the Enterprise Act 2002 against unilateral behaviour, such as refusal to supply or the imposition of unfair prices or other trading conditions, to stricter effect than under Article 82.

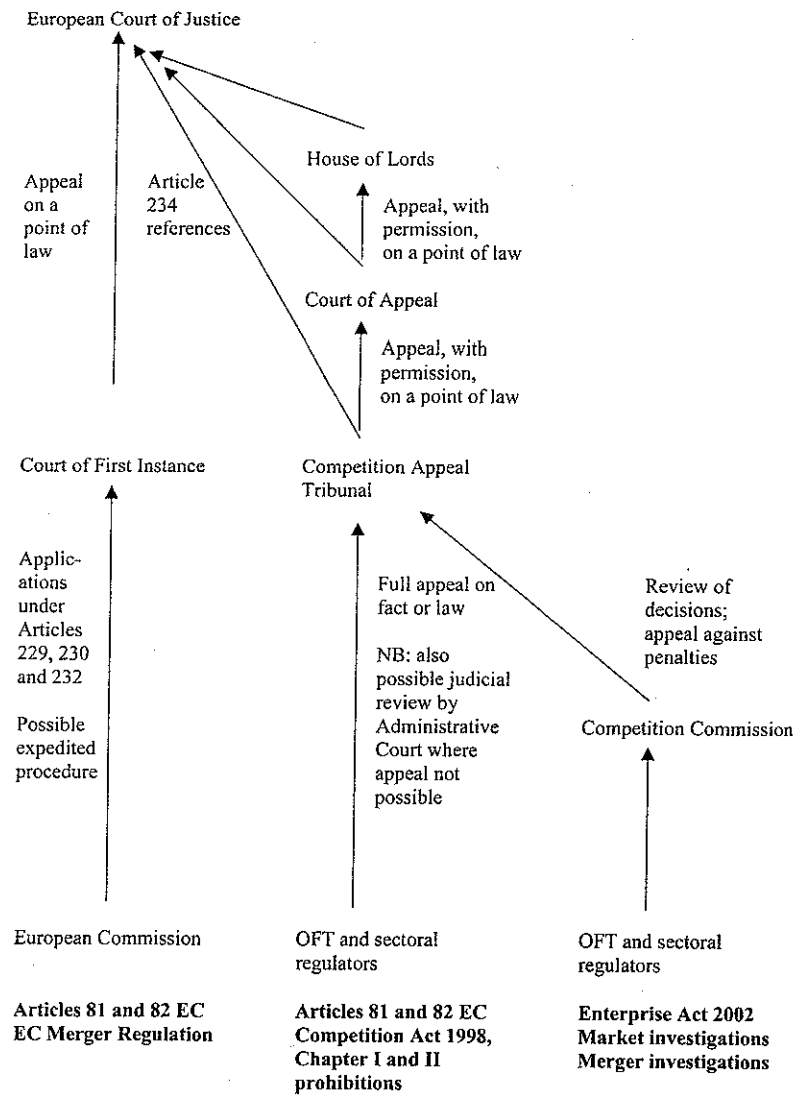
#### (iv) Protection of 'other legitimate interests'

Recital 9 of the Modernisation Regulation states that its provisions should not preclude Member States from applying national legislation that protects legitimate interests other than the protection of competition on the market, provided that such legislation is compatible with general principles and other provisions of Community law<sup>266</sup>; the recital specifically says that legislation intended to prevent undertakings from imposing on their trading partners terms and conditions that are unjustified, disproportionate or without consideration could be applied by Member States. Article 3(3) therefore provides that the Regulation does not preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by Articles 81 and 82 of the Treaty. It follows that regulatory obligations imposed on undertakings, for example, under the Telecommunications Act 1984 or the Gas Act 1986, imposed for reasons other than the protection of competition, can be enforced, notwithstanding that they are more onerous than the provisions of competition law.

## 4. THE INSTITUTIONAL STRUCTURE OF EC AND UK COMPETITION LAW

The diagram overleaf sets out the institutional architecture of EC and UK competition law.

266 See, to similar effect, Article 21(3) of the ECMR, discussed in ch 21, pp 825-827.



CHAPTER 3

# Article 81(1)

This chapter is concerned with Article 81(1) EC which prohibits agreements, decisions by associations of undertakings and concerted practices that are restrictive of competition. Article 81(1) may be declared inapplicable where the criteria set out in Article 81(3) are satisfied: the provisions of Article 81(3) are considered in chapter 4. An agreement which is prohibited by Article 81(1) and which does not satisfy Article 81(3) is stated to be automatically void by virtue of Article 81(2)<sup>1</sup>. The full text of Article 81 is as follows:

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:
  - (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
  - (b) limit or control production, markets, technical development, or investment;
  - (c) share markets or sources of supply;
  - (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
  - (e) make the conclusion of contracts subject to the acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

<sup>1</sup> See ch 8, p 286ff on the numerous issues that arise from the provision for automatic voidness in Article 81(2).