



Ten Years of Regulation 1/2003: Taking Stock

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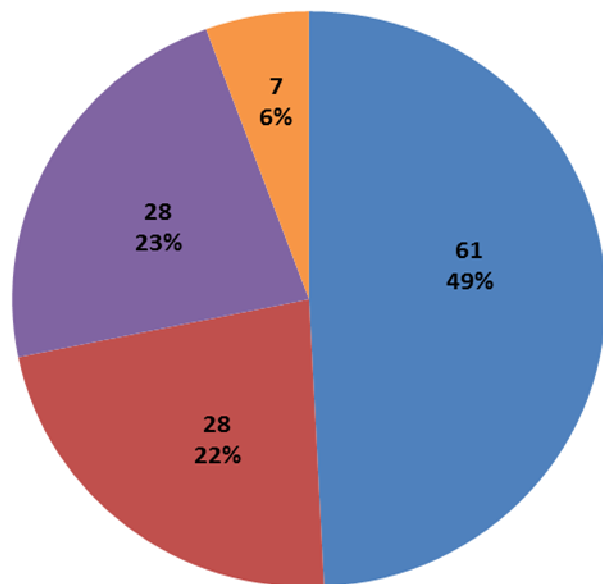
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Competition

Commission and the NCAs: enforcement record (2004-2013)

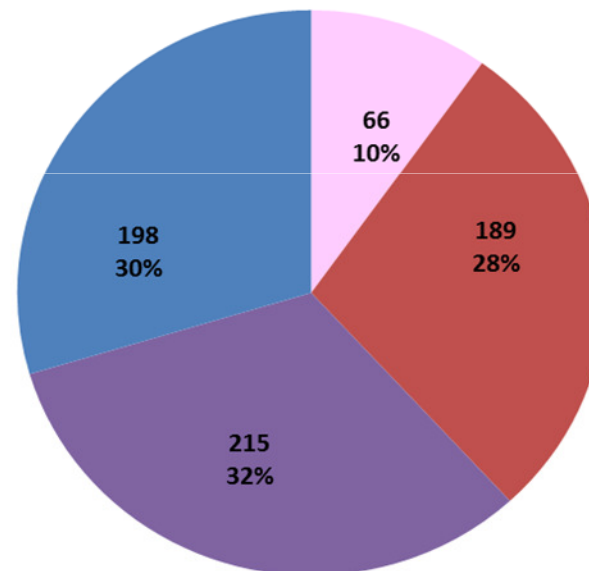
COM



- Art 101 - Cartels
- Art 101 - Other horizontal or vertical
- Art 102 and Art. 102 & 106
- Procedural

Total: 124

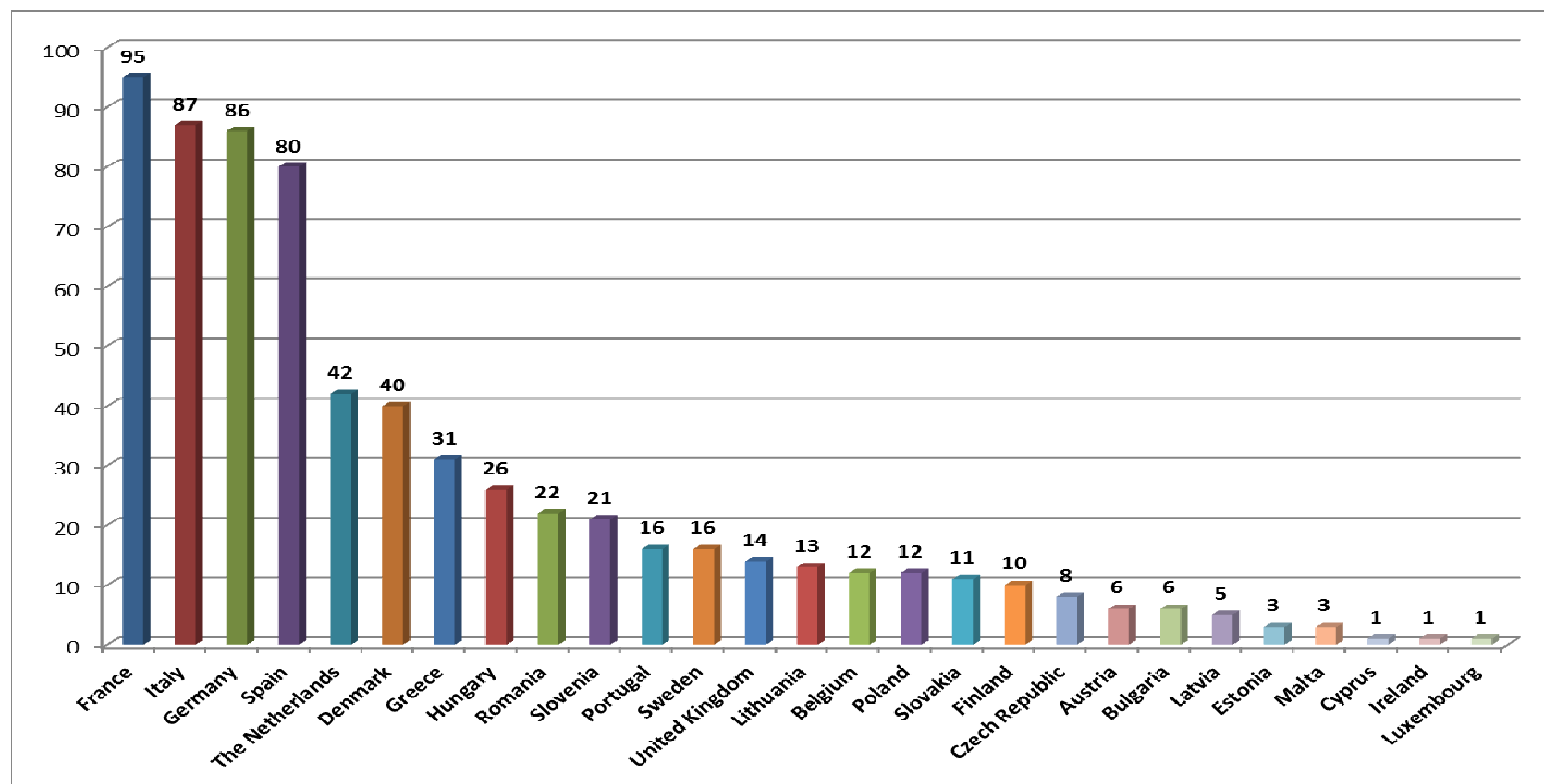
NCAs



- Art. 101 & 102
- Art. 101
- Art. 102
- Art. 101 - Cartels

Total: 668

Envisaged decisions by NCAs May 2004 – Dec 2013

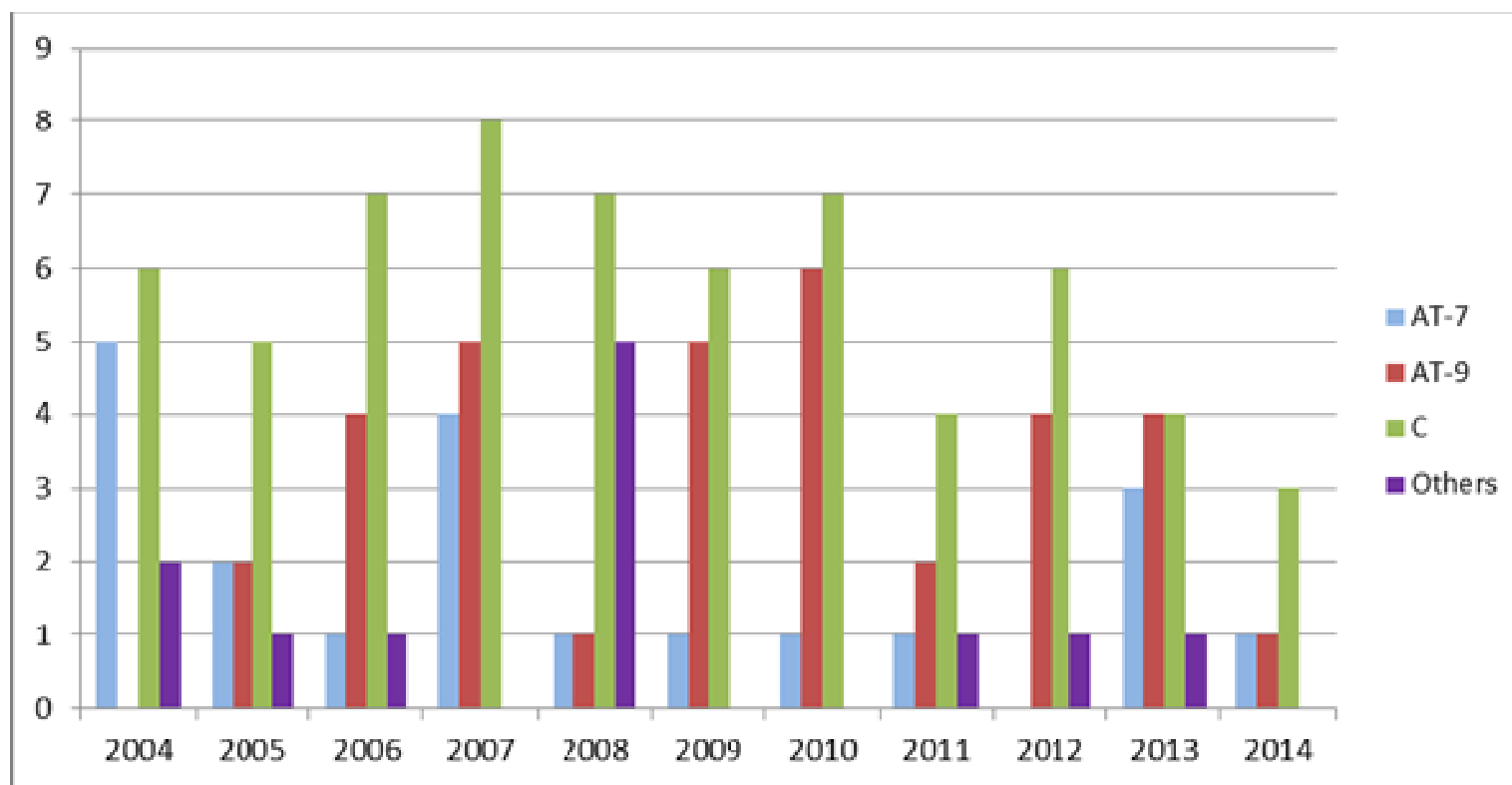




Convergent application of Arts 101 and 102 TFEU

- Satisfactory **level of convergence** in the **application** of substantive rules
- Facilitated by:
 - formal **consultation mechanisms** in Reg. 1/2003
 - **informal dialogue** within ECN

Commission decisions: type of procedure





Enforcement by national courts

- Under Reg. 1/2003 **national courts have become an important arm of application** of the EU competition rules.
- Building on the mutual duty of loyal cooperation enshrined in Article 4(3) TEU, Reg. 1/2003 foresees a **number of mechanisms to promote consistency**.
- One of the most powerful tools is the possibility for **Commission to intervene as amicus curiae** (Art 15(3)).



Article 15(3) of Reg. 1/2003: state of play

- The Commission participated as amicus curiae in national court proceedings on **13 occasions and in 8 Member States**: France, Belgium, Slovakia, Austria, the Netherlands, the UK, Ireland and Spain
- Most amicus curiae interventions have been made before **courts of last instance** (8). The remaining interventions were before **appeal courts** (3) and **first instance courts** (2)



Amicus curiae: Basis for intervention

- **Art 15(3) of Reg. 1/2003 empowers** the Commission to intervene on its own initiative whenever the coherent application of Articles 101 and 102 so requires
- The Court of Justice clarified that the Commission may intervene **even if the litigation concerns non-competition rules** (e.g. rules on tax deductibility of fines) if their **application may have an impact on the effective and coherent enforcement of the competition rules** - Case C 429/07 *Inspecteur van de Belastingdienst v. X B.V.*



- The Commission has **submitted amicus curiae observations** on:
 - a **wide range of issues** e.g. tax deductibility of cartel fines, protection of access to leniency documents in actions for damages before the national civil court, interpretation of the notions of appreciable effect on trade between Member States, the application of Article 101 to vertical agreements.
 - commercial behaviour in **different sectors** e.g. telecommunications, energy, motor vehicles, basic industries.
- The Commission **limits its observations to an economic and legal analysis of the facts** underlying the case pending before the national court.



Benefits of amicus curiae observations

- **Assist national courts** in the application of EU competition rules and **foster the coherent application** of those rules throughout Europe
- Provide an **opportunity** for the Commission to **clarify the approach it takes in soft legislation to novel issues**
- **Directly followed by national courts in most cases** or **sometimes prompted national courts to ask Court of Justice to give preliminary ruling** pursuant to Article 267 TFEU and thereby contribute to clarification of the law (e.g. C-681/11 *Schenker & Co. and Others* or C-439/09 *Pierre Fabre Dermo-Cosmétique SAS* where Court in essence confirmed the Commission's views)



Issues to be examined further: Institutional setting of NCAs

- **Member States are largely free in designing NCAs** – multiple forms, constant evolution
- Art. 35 of Reg. 1/2003 – **effectiveness**
- **Compare with detailed EU requirements for national regulators in other fields**
- Important progress in recent years: **more autonomy and effectiveness** (EU Programme Countries, European Semester)
- But rollback by MS is possible and concerns persist in some MS.



Issues to be examined further: Convergence of procedures and sanctions

- **No harmonisation at EU level:** NCAs apply Arts 101/102 according to different procedures and sanctions
- Many MS voluntarily aligned with Reg. 1/2003 to varying degrees
- **ECN work to promote convergence:**
 - Reports on Investigative and Decision-Making Powers / ECN Recommendations on enforcement powers / Model leniency program
- Status quo: **progress towards more effective enforcement;** but patchwork of divergent national systems



Set of 7 ECN Recommendations on key enforcement powers

- Power to **set priorities**
- **Investigative powers (inspections and RFIS)**
- Power to **gather digital evidence**
- **Ability of staff from other NCAs to assist with inspections**
- Power to adopt **interim measures**
- **Commitment procedures**
- Power to impose **structural remedies**