Soft Law in EU Competition Law and its Judicial Reception in Member States

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Research Question

How Does the National Judiciary Take into Account Commission-issued Competition Soft Law in its Judgments post-Regulation 1/2003?

Normative Underpinnings

- In a decentralised system of enforcement of Articles 101 and 102 TFEU, the achievement of CONSISTENCY and CERTAINTY (PREDICTABILITY) in the law should be of primary importance
- The achievement of the above two goals also poses the primary challenge
- The above goals could be furthered by closer national adherence to legislative guidance by the European Commission (guidelines, notices, communications in the areas of Article 101 and 102 enforcement)
- National courts – as ultimate instances of normative ordering in democratic societies – are institutionally best placed to further the above two goals. The study therefore focuses on their work with competition soft law (Article 101 and 102 guidelines, notices, communications).

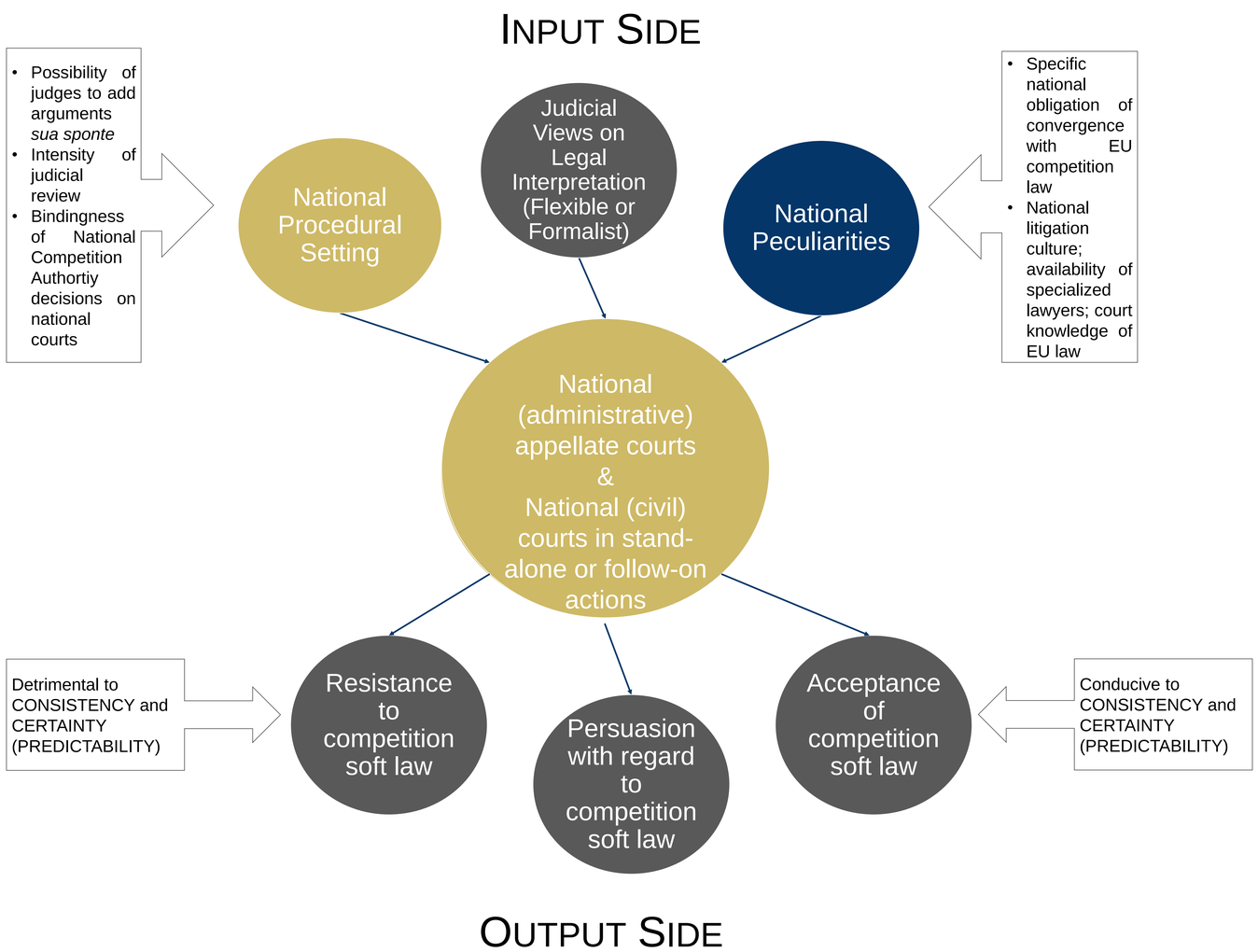
Methodological Choices

•Method for the empirical part: comparative study of national court judgments in 4 EU jurisdictions (UK, the Netherlands, Germany, and France)

•Selection of courts for the empirical part: appellate instances to NCA decisions (public enforcement) and courts hearing private competition law disputes (private enforcement)

•Soft law selection:
•- *de minimis* notice C (2014) 4136 final
•- Article 101.3 guidelines OJ C101 [2004]
•- Article 102 guidance OJ C45 [2009]
•- Guidelines on vertical restraints OJ C130 [2010]
•- Guidelines on horizontal cooperation agreements OJ C11 [2011]

The Research Model Illustrated



Hypotheses

- Hypothesis 1: national courts can explicitly reject engaging with soft law due to its non-bindingness (resistance)
- Hypothesis 2: national courts can explicitly engage with soft law (acknowledgment)
- Hypothesis 3: national courts can arrive at a result not inconsistent with soft law in their judgments, but without mentioning soft law as such (persuasion)

Theoretical Assumptions

- It is assumed that:
- - courts under Hypothesis 1 exhibit a black-letter, formalistic view on law
- - courts under Hypotheses 2 and 3 exhibit a more flexible, pluralist view on law
- The above assumptions allow for embedding of the research in literature on multi-level governance – an example of a plurcentric model for governing a complex polity (the EU)

National Factors Affecting SL Invocation

•The peculiarities of the national procedural setting, namely:
•- possibility for judges to add arguments *sua sponte*
•- intensity of judicial review
•- bindingness of NCA decisions on courts

•Other substantive legal or socio-economic peculiarities such as:
•- specific, national obligation for convergence with EU competition law
•- litigation culture, presence of prominent law firms with specific knowledge of EU competition law